# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1961

## No. 304

CONTINENTAL ORE COMPANY, a Partnership, and HENRY J. LEIR, ERNA D. LEIR, LINA SCHLOSS, as Individuals and as Partners under the trade name and style of CONTINENTAL ORE COMPANY, *Petitioners,*

vs.

UNION CARBIDE AND CARBON CORPORATION; UNITED STATES VANADIUM CORPORATION; ELECTRO METALLURGICAL SALES CORPORATION; ELECTRO METALLURGICAL COMPANY OF CANADA, LIMITED; VANADIUM CORPORATION OF AMERICA, *Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONERS' OPENING BRIEF

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### Question 2

Petitioners, against whom a directed verdict was ordered by the Appellate Court as a matter of law, were deprived of a jury trial by the Appellate Court below which, in directing a verdict, weighed the evidence, made factual rulings on the sufficiency of the evidence of

## Table of Authorities Cited

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### I

### OPINIONS IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 289 F.2d 86 (1961).

No other opinions were delivered by any of the Courts below.

## II

### JUDGMENTS BELOW AND JURISDICTION

This was an antitrust action which was filed in the Northern District Court for the Northern District of California, Southern Division. It was tried by a jury, the late Hon. Edgar S. Vaught presiding. The jury returned a verdict in favor of defendants and judgment was entered. (R. 104-105.) Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment. (R. 2583-2584.) Petitioners (plaintiffs below) filed a Petition for Rehearing on April 21, 1961. (R. 2584.) This Petition was denied on May 15, 1961. (R. 2584.)[1]

The jurisdiction of this Court was invoked under 28 U.S.C. Section 1254(1).

This Honorable Court granted petitioners' Petition for a Writ of Certiorari on October 23, 1961. (R. 2584.) The Certiorari was specifically limited to certain questions, which are set forth in Section IV of this Brief.

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[1]Volumes I through VII of the Record herein cover record pages 1 through 2586 and contain the record as originally printed, which includes many of the exhibits. These volumes also include the record reference where every exhibit was offered in evidence. Whenever an exhibit is referred to herein, the reference is to the page where that exhibit appears in Volumes VI and VII of the original record, and Volumes VIII and IX of the record printed in this Court, followed by reference to the page where the exhibit was offered in evidence which will be found in Volumes I through VI of the original record. Volume VI contains pages 2069 to 2286. Volume VII contains pages 2311 to 2586. Volume VIII contains pages 1 to 314. Volume IX contains pages 315 to 610.

## III

### STATUTES INVOLVED

In this case, petitioners claim that respondents violated the antitrust laws. The pertinent statutes involved are:

Sherman Act, Section 1, July 2, 1890, Chapter 647, Sec. 1, 26 Stat. 208, 15 U.S. Code, Sec. 1:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Sherman Act, Section 2, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2:

> "Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Petitioners brought their action under Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U.S.Code, Sec. 15:

> "Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## IV

## QUESTIONS PRESENTED

In granting the Writ of Certiorari in this case, this Honorable Court limited this appeal to the following questions:

1. Whether an Appellate Court can take away from a jury the question of causal effect concerning an injury by a 100% two-company monopoly (admittedly achieved pursuant to an intent to monopolize) when the question of violation is confessed and the issue of measurement of damages is more than sufficiently supported by relevant economic data and where the destruction of the plaintiff company (petitioner herein) was admitted to be, by a chief executive officer of one of the defendants, an important goal of the monopolists?

2. Whether petitioners, an American company, can claim damages under the antitrust laws for injury caused to them by their elimination from the Canadian market by two other American companies (respondents herein) who had entered into a conspiracy to eliminate all competition and to monopolize the industry, and as part of the conspiracy, one of the respondent American companies utilized its domination and control over a wholly owned Canadian subsidiary, which had been given a discretionary power by the Canadian government to allocate the importation of vanadium into Canada during the war, to exclude the imports of petitioners (competitors) from entering Canada for sale to petitioners' Canadian customers, the refusal of the Canadian subsidiary to allocate vanadium to petitioners' Canadian customers being directed by its American parent company pursuant to the

overall conspiracy to eliminate all competition and specifically to eliminate petitioners from the American vanadium business. This issue was erroneously directed against petitioners in the Circuit Court's asserted misapplication of this Court's recent opinion in *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961).

3. Whether petitioners, against whom a directed verdict was ordered by the Appellate Court, were deprived of a trial by jury by the Appellate Court below who weighed the evidence, made factual rulings on the sufficiency of evidence of causation, did not view the evidence as a whole, did not allow petitioners the benefit of their evidence, did not allow petitioners the benefit of all inferences and presumptions to be drawn from the evidence and did not resolve all conflicts in the evidence in favor of petitioners in direct conflict with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

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## V

## STATEMENT OF THE CASE

### 1. THE COMPLAINT

This action concerns the exclusion of petitioners from a monopoly industry, the milling, manufacture and sale of vanadium oxide and ferrovanadium.[2] Petitioners were

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[2]Vanadium is a rare metallic element found in the United States on the Colorado Plateau, a geographical unit formed by the western part of Colorado, the eastern part of Utah and the northern parts of New Mexico and Arizona. The vanadium-bearing ore is first mined, then converted into vanadium oxide at mill sites, located near the ore deposits. These mills crush,

distributors and agents in these products and, after a time, in other alloy metals. (Pl. Ex. 119; R. 2212, 1089; Pl. Ex. 120; R. 2213, 1094; Pl. Ex. 124 for Id.; R. 537, 1103; Pl. Ex. 125 for Id.; R. 539, 1106.) Respondents are fully integrated miners, millers, and manufacturers of ferrovanadium, other vanadium products and other alloys and metals. (Pl. Ex. 6; R. 2069, 115; Pl. Ex. 7; R. 2072; 117.)

The complaint filed in this action alleges a classic Sherman Act case, Sections 1 and 2. (R. 3-25.) In great detail it describes the parties, the nature of the commodity involved, its uses, the background of the industry, existence of independent producers, control of the industry by respondents, a combination and conspiracy to monopolize the vanadium industry and the elimination of petitioners from the industry. (R. 3-25.)

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roast and leach the ore to produce a substance known as "red cake". This red cake is then fused into a black oxide, which is interchangeably called vanadium oxide, vanadic acid, vanadium pentoxide or $V_2O_5$. (R. 166-169.) This black oxide is then converted into ferrovanadium, a ferro-alloy, through the application of great heat. This conversion may be accomplished either by means of an electric furnace or by an alumino-thermic process. Respondents utilized the electric furnace process of conversion. (R. 170-171, 1827-1828.) Petitioners utilized the alumino-thermic process, a process which is much cheaper and does not require large and expensive investments in electric furnaces. (Id., R. 841-842.)

The vanadium oxide produced at the mill sites located on the Colorado Plateau is then shipped to electric furnace plants, located in the East, for conversion to ferrovanadium. (Pl. Ex. 6; R. 2069-2072, 116.)

The major customers for vanadium products are the steel companies, which use the ferrovanadium in the steel bath to add toughness and tensile and torsional strength to the steel. (R. 1523-1529.) Vanadium steels are used in the manufacture of high speed tools, machine and automobile parts, and in armor plate.

The complaint charges respondents with violating Sections 1 and 2 of the Sherman Act pursuant to an agreement to control and dominate the production and sale of ferrovanadium and vanadium oxide, to suppress competition between themselves and to fix prices. (R. 13-15.)

The complaint alleges further that pursuant to this combination and agreement, Electromet Sales, one of the respondents, supplied VCA, another of the respondents with vanadium oxide supplies in order to allow VCA to maintain its position as the largest seller of ferrovanadium and vanadium oxides in the United States. (R. 15.)

The complaint alleges that as part of this conspiracy, respondents intended to and did exclude all independent producers of ferrovanadium and vanadium oxide from the vanadium industry, and that petitioners were one of the companies so eliminated. (R. 16.)

Paragraph 30 of the Complaint specifically alleges:

> "One of the direct effects proximately caused by the monopolistic practices herein alleged, as intended by defendants, was the elimination from the industry of independent producers and distributors of ferro-vanadium and vanadium oxide. One of the companies so eliminated from the industry was Continental." (R. 16.)

The complaint detailed petitioners' attempts to distribute and arrange for the production of ferrovanadium during the period 1938 to 1945. (R. 18-20.) The complaint alleges that, as a result of respondents' conspiracy, petitioners were eliminated from the vanadium industry. (R. 23.)

The acts and practices leading to the restraint upon the trade of petitioners and their elimination from the vanadium industry, as alleged in the complaint, may be summarized as follows:

(1) Respondents directly intended to eliminate all independent producers and distributors, including petitioners, from the vanadium industry (Complaint, Para. 30, R. 16);

(2) Respondents sold vanadium oxide between themselves, but refused to sell vanadium oxide to others, including petitioners (Complaint, Para. 28, R. 13-14);

(3) Respondents deprived vanadium oxide millers of a competitive market (Complaint, Para. 28 (a) (4), R. 14; Para. (b) (4); R. 14), interfered with petitioners' suppliers and potential suppliers (Paras. 33, 34, R. 18-19);

(4) Respondents fixed prices on vanadium ores, oxides and ferrovanadium (Complaint, Para. 28 (c), R. 15);

(5) Respondents interfered with Petitioners' Canadian business (Complaint, Paras. 36, 37, 38; R. 19-21).

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## 2. THE PARTIES

### A. Petitioners (Continental Ore)

Petitioners, a partnership, are the successors in interest to a family corporation known as Continental Ore Company, hereinafter referred to as Continental. The guiding light in Continental has been and still is Mr. Henry J. Leir.

Mr. Leir came to the United States in 1938 with an extensive and practical knowledge of ores, metals and

alloys, including vanadium. (R. 1032-1047.) In Europe, he had become familiar with ferrovanadium, which had a much higher vanadium content than the ferrovanadium produced in the United States by respondents. (R. 1063.) The European ferrovanadium contained from 80% to 90% vanadium as compared with 35% to 40% in respondents' product. (R. 1063.) The Europeans employed the inexpensive alumino-thermic method of conversion, while respondents converted their ferrovanadium by means of expensive electric furnaces. (R. 170-171; R. 1827-1828; R. 841-842.)

In 1938, Mr. Leir organized Continental and made his entry into the American vanadium business. He contacted the Apex Smelting Company of Chicago, Illinois, a maker of aluminum, hereinafter referred to as "Apex". (R. 1047-1051.) In 1938 he entered into an agreement with Apex whereby Apex was to build and operate a ferrovanadium plant using Mr. Leir's alumino-thermic method of conversion and produce ferrovanadium for petitioners. Under the agreement, petitioners were to procure for Apex the vanadium oxide necessary to permit Apex to manufacture the ferrovanadium and then petitioners were to sell the finished Apex ferrovanadium product as Apex's exclusive sales agents. (Pl. Ex. 117; R. 2187-2189, 1050.)

Apex commenced producing ferrovanadium under this agreement in August or September of 1940, and continued to produce ferrovanadium for petitioners until October, 1941. (R. 1062, 1124). In October, 1941, a fire suspended operations for a short time. (R. 1154.) On January 27, 1942, Apex notified Mr. Leir that Apex was terminating its contract with Continental. (Df. V's Ex. V-I-Y,

R. 2519, 1173.) Apex terminated production in July, 1942. (Pl. Ex. 122; R. 2215, 1096; See R. 2218-2220.)

Thereafter, petitioners installed a grinder and mixer in a warehouse located on Long Island, New York, and from 1942 to 1944 they attempted to distribute their product Van-Ex, a product which petitioners had developed at a lower cost and which could be used directly in the steel bath in place of ferrovanadium. (R. 840-845, 860; see Pl. Ex. 119; R. 2212, 1089, 989.)

On February 10, 1943, petitioners and the Climax Molybdenum Corporation of Langeloth, Pennsylvania, hereinafter referred to as "Climax", entered into a contract for the conversion of 20,000 pounds of vanadium oxide into ferrovanadium. (Pl. Ex. 111; R. 182-183, 1014.) Climax terminated any further arrangements when Union Carbide threatened it with commercial reprisals if it persisted in remaining in the vanadium business. (R. 829.)

In the Spring of 1944, petitioners and the Imperial Paper and Color Corporation, hereinafter referred to as "Imperial", entered into a contract whereby Imperial agreed to process ferrovanadium and vanadium oxide for petitioners and petitioners undertook to secure the necessary raw materials for Imperial and to act as sales agent for Imperial's entire output. (Pl. Ex. 110; R. 2175, 1014.) Imperial was compelled to abandon this arrangement because of its inability to secure adequate vanadium supplies. (Pl. Exs. 114, 115; R. 184, 2179; 1021, 1023.)

As part of their vanadium business, petitioners had also developed an extensive foreign business with a large Canadian steel mill, the Atlas Steels Limited, hereinafter re-

ferred to as "Atlas". In 1942, petitioners shipped Van-Ex to Atlas from their Long Island plant. (R. 802.) At the trial, petitioners offered to prove that in 1943 they were prevented from shipping their products to their Canadian customers and into the Canadian market by Electromet of Canada, Union Carbide's wholly owned Canadian subsidiary, pursuant to respondents' conspiracy to eliminate petitioners and all other competitors from the American vanadium industry. (Pl. Ex. for Id. 80-108, R. 438-466; R. 801-840; Wolf, R. 813-817; 832-834; 845-851; 1008-1012.) This evidence was totally excluded by the trial Court. (R. 801-851.)

By the end of 1945, petitioners were no longer in the vanadium industry, having lost all prior attempts at successful ventures. (R. 978-981.)

Petitioners' billings and sales are shown in Pl. Ex. 119, 120; 2212-2213; 1089, 1094. In 1941 and 1942 alone, petitioners sold over $200,000.00 in vanadium products. (R. 2212.)

Mr. Leir was exceptionally successful in many other fields of ores, alloys and minerals. (Pl. Ex. 123-126 for Id.; R. 536-541; R. 1097-1106.) The only field of endeavor in which he was not able to become established and to succeed, after a persistent effort to do so, was the vanadium business. (R. 1031-1033, 1097-1114. See Pl. Exs. 123, 124, 125 for Id.; R. 536-541; 1097, 1103, 1106.)

**B. Union Carbide**

Union Carbide is a New York corporation which holds ownership of corporations engaged in the manufacture, distribution and sale of ferro-alloys. (R. 153, 164-166.)

United States Vanadium Corporation (USV) is the wholly owned Union Carbide subsidiary which was engaged in the business of mining and milling vanadium ores on the Colorado Plateau. (R. 27, Pl. Ex. 6; R. 2071, 115.)

In Canada, Union Carbide wholly owned the Electro Metallurgical Company of Canada (Eletromet of Canada), a corporation organized and existing under the laws of Canada. (R. 27-28, 819-820.) Union Carbide sold vanadium products in Canada through this Canadian subsidiary.

Union Carbide or its subsidiaries were the only major domestic producers of vanadium oxide on the Colorado Plateau until about 1940. (Pl. Ex. 18; R. 134, 125; Pl. Ex. 6; R. 2069-2072, 115.)

In 1927, Union Carbide had acquired the properties of the United States Vanadium Corporation, located at Rifle, Colorado and entered the vanadium business. (Pl. Ex. 6; R. 2070, 115.) The Rifle mill was dismantled in 1932 (Id.). In 1936, USV erected an oxide mill at Uravan, Colorado (Id.). The Uravan plant was erected only after meetings with executives of VCA with respect to the possible joint operation of an oxide mill. (Pl. Ex. 52 for Id.; R. 366, 320.) In 1938, the Uravan plant was doubled *at the request of VCA*. (R. 145.) The plant was doubled specifically to supply VCA with vanadium oxide at below market prices. (Id.) In fact, VCA supplied Union Carbide with the steel necessary to increase the plant's capacity. (R. 146.) From 1942 to January, 1944, USV also operated the vanadium mill at Durango, Colorado, as agent for the Metals Reserve Company, a governmental agency which appointed USV its agent for the war time procurement of

vanadium. (Df. U's Ex. U-B; R. 2358, R. 367.) USV acquired ownership of the Durango mill from the United States Government in July, 1944, and operated it until June 2, 1948. (Pls.' Ex. 6; R. 2071, 115.) In 1942 USV erected another mill at Rifle, Colorado. (R. 2070.)

Union Carbide wholly owns the Electro Metallurgical Company (Electromet), which manufactures ferrovanadium from the vanadium oxide mined and milled by its other wholly owned subsidiary USV. (Pl. Ex. 6; R. 2071-2072; 115.) On November 30, 1948, Electromet was liquidated and its assets were transferred to Union Carbide. (Union Carbide Answer, R. 27.) Union Carbide also wholly owned the Electro Metallurgical Sales Corporation (Electromet Sales), which sold the vanadium products for Union Carbide. (Union Carbide Answer, R. 26.) Electromet Sales was merged into Union Carbide on March 14, 1949. (R. 27.)

**C. Vanadium Corporation of America**

Vanadium Corporation of America (VCA) is a fully integrated miner, miller of vanadium oxide and manufacturer of ferrovanadium. (VCA Answer, R. 34-41.)

From 1927 to 1940, VCA's principal source of vanadium bearing ores was a Peruvian mine where it also operated a mill. (Pl. Ex. 7; R. 2072, 116.) In 1932, VCA acquired the assets of a company called the Rare Metals Corporation for $428,000.00. (Pl. Ex. 6; R. 2069, 115.) These assets included a vanadium mill located at Naturita, Colorado. (Id. 2069-2070.) Although it actually acquired the Naturita mill in 1932, the mill was not rehabilitated until 1939 and was not put into active operation until the

middle of 1940. (Id. 2070, 1827.) From 1932 to 1940 VCA relied on its "competitor" USV for its domestic source of vanadium oxide. (Pl. Ex. 8; R. 117, 2074; Pl. Exs. 43, 44, 45; R. 158, 2122, 2145; 279, 281, 283.)

From September, 1942, until February 29, 1944, VCA operated a mill located at Monticello, Utah, for the Defense Plant corporation. This Monticello Plant was erected and planned by VCA officials at government expense. (R. 1836.) VCA leased the plant during 1945 and the spring of 1946. (Pl. Ex. 7; R. 2072, 116.) In 1948, VCA acquired the Durango mill. (R. 1827; and id.)

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### 3. MONOPOLY CONTROL OF THE VANADIUM INDUSTRY

At all times mentioned herein, the business of milling, manufacturing and selling vanadium products was completely monopolized, controlled and dominated by respondents, the Union Carbide and Carbon Corporation (hereinafter called Union Carbide), its divisions or subsidiaries, and the Vanadium Corporation of America (hereinafter called VCA). As has been indicated, the Union Carbide divisions or subsidiaries involved in this case were the United States Vanadium Corporation (herein called USV); Electro Metallurgical Company (herein called Electromet); Electro Metallurgical Sales Corporation (herein called Electromet Sales); Electro Metallurgical Company of Canada, Ltd. (herein called Electromet of Canada). All the above mentioned companies except VCA are either divisions or wholly owned subsidiaries of Union Carbide. VCA is an independent corporation.

**A. Ferrovanadium**

Except for the competition offered by petitioners during their existence, at all times herein pertinent, VCA and Union Carbide *admittedly* maintained a 100% control over the manufacture and sale of ferrovanadium. (R. 1402-1403; 1843-1845; Pl. Ex. 138; R. 1256.) Petitioners were the only competition to respondents in the sale of ferrovanadium for a short period, when they were eliminated as competitors. (Pl. Ex. 119; 120; R. 2212-2213; 1089-1094.) Although during the period from 1938 to 1945 Union Carbide produced approximately 77% of the domestic vanadium oxide from which ferrovanadium is produced (Pl. Ex. 1; R. 1-6, 113; Pl. Ex. 136-137; R. 1253, 1255), it was its principal "competitor" VCA which sold approximately two-thirds of the finished product, ferrovanadium (Pl. Ex. 1; R. 6, 113; Pl. Ex. 3; R. 11-14; 115; Pl. Ex. 138, R. 1256).

Prices for ferrovanadium, the finished product, have always been uniform for each company. From 1938 to 1947 they were $2.70, $2.80 and $2.90. (Pl. Ex. 4, 5; R. 23-48, 114.) Thereafter there were uniform increases.

**B. Vanadium Oxide**

At all times herein pertinent, respondents controlled over 90% of the vanadium oxide produced in the United States. (Pl. Ex. 138; R. 1256, 1844-45 (1938-1947).) Respondents' mills on the Colorado Plateau accounted for over 90% of the domestic production of vanadium oxide. (Pl. Ex. 136-137; R. 1253 (1938-1945).) USV, a Union Carbide subsidiary, alone produced and sold more than 77.2% of the vanadium oxide manufactured and sold in

the United States. (Pl. Ex. 136-137, R. 1253 (1938-1945); 1844-1845; Pl. Ex. 18; R. 134, 125.) At various times, independent oxide mills attempted to start independent vanadium operations on the Colorado Plateau in competition to respondents, but, as will be shown below, they were deliberately and systematically eliminated by respondents, so that by 1944 respondents were the *only* producers of vanadium oxide on the Colorado Plateau. (Pl. Ex. 18; Id. R. 896-897.) At the trial, petitioners produced substantial evidence, including a confession by the Chief Executive Officer of USV, Mr. Blair Burwell,[3] that these independent mills were unable to operate because respondents, as part of their conspiracy to monopolize the entire vanadium industry, deliberately eliminated them as competitive vanadium oxide millers or producers. (R. 209.) The evidence in this regard showed that respondents' conspiracy to monopolize was so thorough that even the production of those independent mills which produced vanadium oxide

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[3]Without any doubt, Blair Burwell was the most informed man on vanadium and uranium on the Colorado Plateau. He was Union Carbide's principal managing agent on the Colorado Plateau. There are few transactions mentioned in the Record in which he was not the prime actor and controlling influence. He was vice-president of Union Carbide's subsidiary, USV; a Director of USV; Assistant to the Vice-President in Charge of USV's mining operations; an Engineer whose specialty was radium, vanadium and uranium; a Consultant for the Atomic Energy Commission; the Appraiser for the United States on the Colorado Plateau for the valuation of vanadium lands; Vice-President of Union Mines Development Corp. He conducted special studies, surveys and appraisals of mineral resources in the United States for Union Carbide. He was a Director of the Metal Mining Fund of the State of Colorado; a writer of technical texts on mining, Chairman of the Board of Minerals Engineering Co., a Director of the Climax Uranium Company. He has been actively engaged in mining on the Colorado Plateau since 1919. (R. 135-144.) In addition he has extensive experience in uranium. (R. 136-142.)

only as a by-product was purchased by Union Carbide specifically "to keep it off the market". (R. 178.)

Domestic prices for vanadium oxide by each company uniformly were $1.10 per pound of $V_2O_5$ until 1947. After 1947 prices were uniformly increased by respondents. (Pl. Ex. 4; R. 21-26, 114; Pl. Ex. 5; R. 33-48, 115.)

**C. Vanadium Ore**

By 1940, USV alone held more than a 90% control of all easily accessible ore bodies on the Colorado Plateau. (Pl. Ex. 18, R. 134, Col. 17; R. 160-161; 506.) Ore prices paid to miners were identical for both respondents. (R. 211-218; 496-500.) Both respondents adopted an identical price based on 2% vanadium content. (R. 497.) During the period from October 1938 to June 1942 the price paid to miners for their ore was 21 cents a pound for 2% ore. (R. 211-218; 496-500.) After June, 1942, both respondents paid the miners 31 cents a pound for 2% ore. (R. 218, 498-499.)

The independent miners, because of respondents' conspiracy, had no dependable alternative markets for the sale of their ore and were required to sell it to respondents at the prices set by respondents, both of whom had fixed identical prices for the ore. (R. 211-218; 496-500.) The few oxide mills that were started to give the miners a possible competitive outlet were deliberately eliminated from competition by respondents, as will be shown in detail hereinafter. And when the opportunity arose for the independent miners to acquire government mills after the war, these were also acquired by respondents, even though they had no need for additional mills at the time.

(Pl. Ex. 37; R. 152, 243; Pl. Ex. 38; R. 2117-2120; 244; Pl. Ex. 6, R. 2070, 115.)

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### 4. THE EVIDENCE PRESENTED AT THE TRIAL

Initially, petitioners will discuss respondents' overall conspiracy and monopolization of the vanadium industry, and, subsequently, the effect that this conspiracy had on petitioners.

#### A. There was direct evidence, including a confession by one of respondents' Chief Executive Officers, that respondents had agreed to monopolize, to fix prices and to restrain trade in the vanadium industry

All during the period of time that petitioners attempted to enter the vanadium business, respondents were engaged in an *admitted* conspiracy to monopolize the industry, to fix prices in the industry and to eliminate all independent competition.

The agreement between respondents started prior to 1938, when Union Carbide and VCA entered into an agreement whereby VCA was to be established as a competitor of Electromet in the ferrochrome business to forestall possible antitrust action which might come up if Electromet were the only producer of ferrochrome. (R. 193-197; 255-268.) In return for being set up as a controlled competitor in ferrochrome, VCA was to be allowed to dominate the vanadium business, maintain its vanadium markets and set the price for vanadium without price cutting or competition by the Union Carbide group of companies or any other competitor. (R. 193-197; 255-268.)

Mr. Burwell testified:

> "Anyway, Mr. Sneath said that the company was set up, Vanadium Corporation, to sell low-carbon ferrochrome, and in turn for which Carbide, they had agreed—he had agreed that the Union Carbide—Electro Metallurgical Company would not compete in the vanadium field in the alloys, would let the Vanadium Corporation of America set the price and be the leader on the market." (R. 262.)

Mr. Burwell testified that there was an agreement between Union Carbide and VCA to maintain the price of ferrovanadium and vanadium oxide which prevented Union Carbide from cutting the price of ferrovanadium so as to make it competitive with other alloys. He testified that Union Carbide did not adopt a competitive price for ferrovanadium and vanadium oxide but maintained artificial and fixed high prices because if Union Carbide lowered its prices to competitive prices, VCA would have been eliminated from the vanadium business and this would have violated the conspiratorial agreement between respondents whereby VCA would be allowed to remain in the vanadium business as a controlled competitor and respondents would monopolize the vanadium industry. (R. 151-152; 156-157; 191-197.)[4]

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[4]Mr. Burwell testified:

"And we were well aware at that time we were restricted in our sales in this country . . . As the producer and executive in charge of producing materials from the time it was part of my duties, your Honor, to know what the marketing conditions were and where it went and under what condition, what setup, and over the period of time prior to 1938 . . . I, to my satisfaction, to the best of my knowledge, knew that there was an agreement between the Vanadium Corporation of America and the United States Electro Metallurgical Company which restricted . . ." (Burwell R. 151-152) . . . "We couldn't sell it, your Honor, because we

In 1938, since VCA did not take all the increased production of USV's Uravan plant, which had been doubled at VCA's request (R. 145), Mr. Burwell, USV's chief executive officer and field man, complained to Mr. Gormely of Union Carbide that, because of its high inventory, USV was faced with a shut-down of its vanadium mining operations. (R. 182.) Mr. Burwell recommended that the price of vanadium be dropped so as to make it competitive with other alloys and thereby increase its demand. (R. 182-183.) Mr. Gormely attempted to help and actually resorted to subterfuge to avoid the agreement between Union Carbide and VCA not to sell vanadium below the fixed price by attempting to sell vanadium in a disguise called

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couldn't cut the price to a point where we could sell it in the United States . . . We couldn't cut the price because the Metallurgical Company wouldn't let us . . ." (R. 152-153) ". . . all we needed to do to unlock the door was to open our minds and our operations, was to reduce the price to make it competitive . . . we couldn't do anything . . . we couldn't because there was an agreement between these two companies, to the best of my knowledge . . . that prevented us from reducing the price of the vanadium and ferro-vanadium and we continued to sell vanadium oxide to the Vanadium Corporation of America. Instead of cutting the price on our huge output to stimulate production in Colorado" (R. 156-157). "I said, 'Why didn't we go ahead and cut the price of vanadium?' I believed that the Vanadium Corporation of America could not produce vanadium at a price of $2.25 a pound and survive. Mr. Gormely said that would put the Vanadium Corporation out of business. I said, 'All right, suppose you do put them out of business. What is the difference? We have people down here working—the survival of our business or the survival of the Vanadium Corporation business?' I said, 'Where do our loyalties lie? Why don't we put the Vanadium Corporation out of business?' That is clear words. He said 'If we put the Vanadium Corporation out of business, we would lose our control competitor in ferro-chrome.' That, your honor, is the cold words. There is nothing wrong about that." (R. 193-194.) ". . . He told me that the Vanadium Corporation of America had been established as a friendly competitor to sell low carbon ferro-chrome in the United States, and the reason for that was to forestall anti-trust action that might come up in the future. That was on the advice of their attorneys at that time." (R. 197.)

"silvaz". (R. 183.) The silvaz was sold to several customers, but VCA soon complained that "there had been a breach of their understanding" and Electromet was then "*forced* to discontinue the production of silvaz". (R. 183; 195; Pl. Ex. 68; R. 2151, 627.)

Respondents' letters and correspondence showed the most intimate collaboration between respondents. For example, on November, 1938, Electromet Sales sold VCA 130,000 pounds of vanadium oxide at 80¢ a pound, which was 30¢ below respondents' contract price of $1.10. (Pl. Ex. 10; R. 49, 118; R. 1896-1898.)

**B. All during the period 1940 to 1942 when petitioners and Apex were attempting the manufacture and sale of ferrovanadium and receiving only irregular and sporadic supplies, USV and VCA, as part of the overall conspiracy to monopolize the vanadium industry, had arrangements whereby VCA was receiving oxide from USV at below market terms or by special arrangements**

**1. The "Maggie C" Agreement**

In June 1939, an agreement called the "Maggie C" Agreement was entered into between respondents which provided that USV would mine ore from certain VCA mining claims, convert the ore to vanadium oxide for VCA at USV's Uravan plant at 65 cents a pound in 1939 and 75 cents per pound during 1940 for delivery to VCA. (Pl. Ex. 8; R. 2074, 117; Pl. Ex. 43, 44, 45; R. 158, 2122, 2125; 279, 281, 283.) This price was 45 cents below the market price of oxide. Under the "Maggie C" agreement, during 1939 and 1940, 717,848 pounds of vanadium oxide were delivered to VCA by its "competitor" USV. (Pl. Ex. 8, R. 2074; Pl. Ex. 150; R. 2340, 1583.) And during this time VCA executives were given access to USV's

records of production, tons of ore mined, grades, costs, etc. (R. 276-289.)

And after all available ore had been mined out of the "Maggie C" claims, VCA was allowed to continue to draw on USV oxide in excess of the amounts of ore being produced from the "Maggie C". (R. 276-289.) VCA was permitted to overdraw its account by 300,000 lbs. of oxide before the vanadium was even produced. (R. 283-240, 1957.)

**2. The Dry Valley Agreement**

On September 26, 1941, VCA and USV got together on still another agreement, the "Dry Valley Agreement". (Pl. Ex. 46; R. 2126, 294.) Under this agreement, USV was permitted to enter certain Dry Valley claims which USV had turned over to VCA and to mine the additional 300,000 lbs. of ore which VCA had overdrawn. (Id.) This arrangement continued to 1942. (Pl. Ex. 150; R. 2340, 1583.) The Dry Valley properties originally were owned by Molybdenum Corporation of America. (R. 285.) The properties were subsequently offered for sale. VCA was interested in acquiring the properties, as was USV. USV bought the properties. Mr. Van Fleet outbid VCA and acquired the claims. When Mr. Bransome (VCA) heard of this, he complained to Mr. Haggerson, president of Electromet and a vice-president of Union Carbide, that Mr. Van Fleet eavesdropped on a conversation and discovered VCA's bidding price. (R. 287.) He asked USV to turn these claims over to VCA. (R. 288.) Mr. Haggerson ordered Burwell and Van Fleet to return the claims to VCA against their business judgment. (R. 288.) Almost immediately Mr. Bransome entered the Dry Valley agree-

ment with USV to repay the overdraft by allowing USV to mine the claims. (R. 284-290.)

**3. Respondents Fixed Prices**

During the period 1933-1939, USV sold to its only competitor, VCA, 20% of the latter's oxide requirements. (Compare Pl. Ex. 3; R. 14, with Pl. Ex. 8; R. 2074.) And almost unbelievably, although during this period VCA was purchasing 20% of its raw materials (oxide) from USV, VCA sold two thirds of the market as to the finished product (ferrovanadium). (Pl. Ex. 3; R. 11-13, 113.)

In 1939, Van Fleet and Burwell again requested the Union Carbide group to lower the price of ferrovanadium to one in "reasonable relationship to our costs" and thereby increase its demands. (R. 147-149.) In spite of high inventories which threatened to close down USV's mining operations on the Plateau the price was not lowered. (R. 147.) Instead, Mr. Sneath, the European representative of Union Carbide, arranged for the sale of one million pounds of oxide in Europe through a European cartel headed by Sir Edwin Davies. (R. 148-151.) The oxide was sold in Germany and not in this country at a reduced price because there was an agreement between Vanadium Corporation of America and the Electro Metallurgical Company restricting the sales in this country (R. 150-153), and preventing Electromet from cutting the price so as to sell the surplus oxide.

In 1940, because of the increasing war demand, it was decided that VCA would open its Naturita plant, which VCA had allowed to remain dormant while it purchased oxide from its competitor USV.

Prior to the opening of this plant, Burwell of USV, Van Fleet of USV and Bransome of VCA met at Mr. Bransome's private Club in New York "in or about 1939". (R. 211.)[5] At this meeting the two "competitors" discussed labor rates, ore costs, trucking rates, production costs and the most intimate corporate secrets. (R. 214-215.) At that meeting it was agreed that both companies would pay 21 cents per pound of vanadium content in the ore, 2% being the basing point. (R. 214-216.) Mr. Bransome (VCA) told Mr. Burwell (USV) "All right we will work with you and we will follow the general or pricing schedule that you have". (R. 215.)

Thereafter, until 1942, both USV and VCA in fact did pay a base price of 21 cents per pound for 2% ore. (R. 215-216.)

In the spring of 1942, Burwell, Bransome and Kett, General Manager of VCA's mining operations, and possibly Mr. Hill (USV) met at Dove Creek, Colorado. (R. 215-217.) At this meeting VCA and USV agreed to increase the base price of vanadium ore to 31¢. (R. 217-219.) After this meeting both companies commenced paying 31¢ for their ore. (R. 218.)

Mr. Burwell testified that there was an agreement between Union Carbide and VCA which required Electromet to follow VCA prices against the business judgment of officers of USV. (R. 145-152, 157, 193-194, 229-241.)[5a]

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[5]Mr. Bransome fixed the meeting place at his private club. Mr. Burwell suggested other meeting places. But "the club was selected because it was less public". (R. 213.)

[5a]The independent miners on the Colorado Plateau subsequently filed an action under the antitrust laws in the United States District Court for the District of Utah, Central Division, claiming

Not only did USV and VCA get together and fix prices, but they set up a Kangaroo court in New York whereby they diligently policed the field to make certain that the fixed prices were maintained. Direct evidence of this type of policing was presented. For example, on November 2, 1941, S. Power Warren, USV General Superintendent at Uravan, reported to his superior, King Haldane, in New York City, that they had "plenty of evidence" that VCA was attempting to raise ore prices, but that Blair Burwell had taken a trip to Uravan and had spoken to Ralph Blitz, VCA General Superintendent at Naturita, about it and "his discussion with Blitz remedied the matter". (Pl. Ex. 35; R. 2114, 218.)[6]

And, on December 24, 1941, Haldane (USV) in New York wrote to Weston and Burwell in Colorado that Mr. Kett of VCA was protesting in New York to USV that USV was trying to take away one of VCA's miner-customers named Lyen by offering him $2.00 per ton "above the established rate". (Pl. Ex. 36; R. 151, 227.) Haldane had advised Kett that he would look into the matter. (Pl. Ex. 36.) On December 27, 1941, Weston replied to Haldane that Lyen was only a "trouble maker" and that USV had checked into the story only to find that they had furnished Lyen with the regular list price and

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that they were injured by respondents' conspiracy to fix the prices paid them for their ore. A jury returned a verdict in their favor in that action. The jury verdict and the judgment entered therein was recently affirmed by the Tenth Circuit in *Union Carbide and Carbon Corporation v. Nisley* (10th Cir., 1961), 1962 Trade Cases, Par. 70,222, page 75,805.

[6]Mr. Burwell (USV) testified that "I asked Mr. Blitz [VCA] what he was paying for ore and he told me. I don't remember exactly what it was but it was more than 21 cents. And I asked him to check with Fred Kett [VCA] as to what the prices of ore we agreed to be". (R. 221.)

had "definitely" not offered him more than the "established rates". (Pl. Ex. 72; R. 2159, 631.)

**4. Respondents Entered Into Joint Export Orders and Allocated Customers**

As already indicated, respondents became particularly concerned about competitors at this time because the European rearmament program which preceded the war in 1939 was generating a new demand for ferrovanadium in Europe and shooting up the export price. (Pl. Ex. 166; R. 213, 1899.) This demand gave independent mills a market which would have permitted them to establish the nucleus of an independent operation and to threaten respondents' monopoly. On March 28, 1940, Mr. Bransome of VCA wrote to a French Company that the high export prices were making for people trying to buy domestic and sell export (Id.). Bransome wrote that they had "this phase under very good control, and if any shipments do get away" "they are very small ones" (Id.).

And pursuant to their conspiracy, respondents divided the foreign orders that did not "get away". For example, in October 1939, a large French concern ordered a shipment of ferrovanadium. (Pl. Ex. 161; R. 208, 1882.) Respondents then commenced a series of intercorporate communications which resulted in the two respondents splitting the shipment. (Pl. Ex. 161 to 166; R. 207-213, 1881-1899.)

In addition, domestic customers were allocated between respondents. For example, in 1940, Burwell, while attempting to sell available uranium concentrates to the Vitro Corporation in Pittsburgh, Pennsylvania, learned

that Vitro could use 100,000 pounds of red cake. He convinced Vitro that the red cake was better suited for their purposes than the hard fused black oxide Vitro was then using. (R. 248-253.) At this time, USV had a tremendous surplus of oxide which threatened to close its mines in the west. (R. 251.) When Burwell enthusiastically reported this prospective sale to Electromet's sales manager he was told that Vitro was a VCA customer and "VCA is selling their vanadium" and "we were not calling on VCA customers". (R. 251.)

And, again, in 1946, Burwell was told by the Sales Manager of Electromet Sales not to mention vanadium to the President of the Crucible Steel Co., because Crucible was a VCA customer and Electromet Sales personnel had been instructed by their superiors not to approach VCA customers. (R. 253-255.)

And, as part of the conspiracy, respondents rigged their bids to the government so as to insure each other a share of the business. (R. 237-240.)[7]

Also, as part of this overall conspiracy to monopolize the vanadium industry, respondents set up a deliberate plan to eliminate any independent competition to this monopoly.

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[7]Mr. Burwell testified that in 1946, he was told that Union Carbide should allow VCA to take part of a government bid because ". . . Mr. Swain has just told me a short time ago that he had prevailed upon the Vanadium Corporation of America to increase the price of ferrochrome silicon to the point that it would not be used as a substitute for low carbon ferro-chrome, and I don't want to antagonize the VCA at this time, and therefore, I would like to have part of this business so we can continue along . . . Mr. Rafferty said 'Mr. Priestley, do I understand that you are still conniving on this business with the VCA? I thought we were all over that kind of monkey-business.'" (R. 239-240.)

**C. Respondents carried out a deliberate and avowed policy to eliminate competitors during the period of petitioners' attempted entry into the vanadium industry**

Commencing in 1938, the war machines of the world were beginning to prepare for World War II. This rearmament gave a new surge to the Plateau. Higher export prices stimulated entry into the vanadium business. (Pl. Ex. 166; R. 213, 1899.)

USV learned of these intentions by "outsiders", and in September, 1938, Mr. Van Fleet instructed Mr. Burwell to secure accurate and definite information on Colorado Oxide production for the purpose of a report to Union Carbide's Board of Directors. (Pl. Ex. 33; R. 144, 173.) In this request, Mr. Van Fleet wrote (Pl. Ex. 33; R. 144):

> "As I discussed with you the other night on the telephone, it has become very important that we find out accurately and definitely who is producing vanadium ore and where it is going. Along with this, we want to know the quality of the ore shipped so that we can get a line on the pounds of $V_2O_5$ . . . We may have to do something about this production . . . These are pretty high prices for us, but it may be necessary to finally do something about it."
>
> "I have an idea that this production of ore which is going to Europe and Japan is quite a quantity of $V_2O_5$ . . . I have been talking about this for some time here in New York, stating that the high prices maintained for $V_2O_5$ in Europe will invite and stimulate this kind of competition and can eventually support a considerable vanadium business, with possibly later on a plant."

Mr. Burwell acquired this competitive information requested by Mr. Van Fleet and made a complete report to

Mr. Van Fleet, specifically so that he could report it to the Union Carbide Board of Directors. (R. 206-208.) In his report to his superiors, on September 19, 1938, Van Fleet stated (Pl. Ex. 34; R. 146-150, 197, at 150):

> "We have already purchased two or three groups of claims which are potential producers and could be the nucleus of an operation. The intensive development during the past year has made it more imperative to continue this policy, and it now appears that we should purchase some properties and possibly install a small plant in Southeastern Utah to *forestall serious competition.* A definite recommendation will be made on this as soon as the field work has been finished." (Emphasis added.)

Mr. Burwell testified that he was subsequently instructed by his superiors to acquire all properties on the Colorado Plateau that could possibly produce vanadium in competition with USV in order "to keep them off the [American] market as producers of vanadium". (R. 209.) Seldom, if ever, has there been a confession of such flagrant violations of the antitrust laws by an executive officer of an offending corporation. Mr. Burwell testified:

> "Q. State whether or not there was, in September of 1938, a communication from any superior of yours in the United States Vanadium Corporation or Union Carbide with respect to a policy on competitive activities on the Colorado Plateau.
>
> A. Yes, there was.
>
> Q. Was this an oral or a written communication to you?
>
> A. Oral.
>
> Q. And who gave you that oral communication?
>
> A. Mr. Van Fleet.

Q. What was the policy as communicated to you?

A. Well, I was—my instructions were to acquire all the properties on the Colorado Plateau that would possibly produce vanadium in competition with the United States Vanadium Corporation.

Q. To acquire them for what reason?

A. To keep them off the market as producers of vanadium.

Q. What market?

A. The American market."

(Burwell, R. 208-209.)

Mr. Burwell dramatically explained:

". . . at that time we knew we had a billion dollar field, and we were playing the cards for a billion-dollar field. And the way you get a billion-dollar natural resource is to acquire it this way. So all may be the tooth and the fang, but this is the way mining engineers proceed—business people proceed—to acquire, control a natural resource, and this policy was directed to me by Mr. Van Fleet, and it was also directed to me previously by other corporation officials previous to 1938. This was a policy that continued from 1926 and has never been stopped." (Burwell, R. 209.)

Pursuant to his instructions, Mr. Burwell set out to accomplish the brutal and systematic elimination of any independent competition and any independent operations that could possibly nurture a competitive vanadium business at any level of the vanadium business.

Burwell gave detailed direct testimony as to the manner in which USV acquired or eliminated all independent sources of vanadium oxide to which petitioners could look or depend upon for their raw materials. The independent

sources of supply which were specifically eliminated by respondents to keep them out of the American market were:

**1. Anaconda Copper Company**

USV purchased its production of approximately 100,000 pounds of $V_2O_5$ per year. (Tr. 206-207.) Burwell testified that USV did not need this oxide at that time (September, 1938), but that USV purchased the Anaconda production only to "keep it off the market", "the American market". (R. 207.)

**2. Gateway Alloys**

This was a small independent mill which an individual named Brown leased from the Molybdenum Corporation of America. Mr. Burwell received specific instructions "to discourage them in any way we could". (R. 292.) Burwell offered Brown a low price for his oxide and then arranged to lease the surrounding mines from which the mill drew its raw ore. (R. 292.) The mill itself was located down in a canyon, while the mines were about 1500 to 2000 feet above it. (R. 292.) After leasing the mines Burwell stripped them of 12,000 to 15,000 tons of easily accessible and inexpensive-to-mine ore. (R. 292.) These mines were unnecessarily and brutally stripped of the easily accessible ore by USV because "we wanted to keep another vanadium operation from getting started". (R. 292-293.) At this time USV had more than sufficient ore at its Uravan mill area and did not need the Gateway ore. (R. 292-293.) Yet USV hauled the Gateway ore approximately 45 to 65 miles over rough roads from Gateway to Uravan to keep it away from the Gateway mill. (R. 292-293.) The reason for this costly haul was that USV

"wanted to keep another vanadium operation from getting started." (R. 293.)

In regard to this Gateway area, Burwell clearly explained how he utilized his exceptional skill as a mining engineer to eliminate the Gateway mill as a competitive operation both then and in the future. (R. 350-352.) He testified that he simply removed the *easily accessible surface* ore that could be used to support a low cost operation and "implement a small plant". (R. 350-351.) He explained very dramatically that by removing this low cost easily accessible ore only the deeper ore would remain. Burwell, as a mining engineer of great ability and experience, knew and he testified that the means of controlling the "whole thing" or the entire Gateway "district" and any future operation was to remove the surface ores which could permit a small plant to get a successful operation going with a small inexpensive "pot-sized plant" and then utilize its profits from this small inexpensive operation to expand its plant and operation into a larger plant which could then economically take advantage of the deeper ores. (R. 350-352.)

To doubly insure the failure of the Gateway mill, which another ill-fated independent miller by the name of Nisley later acquired, Burwell built a road which led from the Gateway tributary claims in a direction away from the Gateway mill and not to the mill. (R. 351-353.)[8]

The mill went broke in 1940. (R. 293.)

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[8]". . . So all we did to help Mr. Brown out and offer to take care of the situation in controlling the district, which were my instructions and which I carried out, was to take all of the surface ore that was available that could be economically taken down to the

**3. Mesa Vanadium Mill**

The entire mill was acquired by USV "to keep it out of production". (R. 303.) USV did not need a mill at this time. (R. 303.)

**4. Loma Mill**

Prior to the time this independent mill was opened, USV was not purchasing ore in any areas close to the Loma Mill. (R. 304.) After the mill was opened as an independent mill, USV started an ore buying station near the mill specifically to keep the ore "away from this mill". (R. 303-306.) This ore was hauled a distance of 150 miles to keep it away from the Loma Mill. (R. 306.) In spite of this additional hauling cost, USV paid no more for the ore around the Loma Mill than it did for its ore at Uravan which was only a 7 to 8 mile haul. (R. 306.) The Loma Mill "closed down for lack of ore". (R. 306.)

**5. Mammoth St. Anthony Mining Company**

In 1938, USV had "too much vanadium" and Burwell feared he would have to shutdown and lay off its own employees. (R. 178.) Yet USV attempted to buy the Arizona production of this mine. (R. 178.) Burwell testified that they purchased this production to "keep it off the market, the vanadium market" in the United States. (R. 178.)

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Gateway plant, and to do that . . . we built the road, not down to Gateway; we built a road up the other side, that went down to Mesa Creek, with bull-dozers and graders which was of no use to the Gateway plant, but over that road we cleaned up all the surface available ores on the claims that bordered the top of the mesa, so when we were through we had all the available cheap ore that could possibly be used to implement a small plant." (R. 351-352.)

Mammoth's mines closed on May 15, 1939. (Pl. Ex. 18; R. 134, 125.)

**6. Blanding Mines**

USV originally negotiated to acquire Blanding Mines. (R. 179-180.) However, VCA eventually entered the scene. (Pl. Ex. 160; R. 2355-2356, 1849.) Blanding Mines had supplied oxide to petitioners in 1940 and 1941. (Pl. Ex. 118; R. 1065, 2205-2206, 2209.) Mr. Leir's manufacturing associate, Apex, was subsequently informed on January 9, 1942, that Blanding could no longer furnish Apex with a supply of oxide. (Pl. Ex. 131; R. 2229, 1242.) This was on the advice and recommendation of Mr. Garbutt, the owner of Blanding. (R. 1695, 1706-1712.) VCA had started to negotiate for the acquisition of the Blanding properties in the Fall of 1941. (R. 1750.) VCA subsequently acquired the bulk of Mr. Garbutt's properties and leased the property to Blanding Mines. (Pl. Ex. 157; R. 2341, 1791.) VCA subsequently received all Blanding's production. (R. 1758-1767.) A fire occurred in June, 1942 and the Blanding mill was not reopened until March, 1943. (R. 177.) The plant was reopened by Defense Plant funds. In 1944, it was turned over to the government. (R. 1729.)

**7. North Continent Mill**

North Continent was turned into an ore selling operation in the Spring of 1943, and ceased to mill vanadium oxide. (Pl. Ex. 18; R. 134, 125.) The payments for the ore came from USV, as agents for MRC. (Df. U.'s Ex. U-3-R; R. 565, 914; Df. U.'s Ex. U-3-T; R. 566, 918.)

**8. The Durango Mill**

This mill was acquired by USV in 1944 because "we wanted to keep control of the production of vanadium" (R. 246) and because some independents were trying to buy it. (R. 242.) USV feared that these independent producers would use this mill to start an independent production of oxide in competition with USV. (Pl. Ex. 38; R. 2117, 244.)

The plant was acquired by USV on July 31, 1944 at a cost of $75,000. (Pl. Ex. 6; R. 2069, 115; Pl. Ex. 38, R. 2117, 244.)

**9. Nisley & Wilson Mill**

Mr. Nisley, one of the owners of this mill, testified that Burwell actually diverted miners from his scales and offered them premium prices to haul their ore a greater distance to USV's mill at Uravan. (R. 655-656.) The mill closed. (R. 658-663.)

This mill was the same mill which Mr. Brown had tried to operate in the Gateway District and whose tributary ore bodies had been unnecessarily stripped by Burwell to "keep another vanadium operation from getting started." (R. 292-293; 351-352.)[9]

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[9]Nisley & Wilson subsequently filed an action under the antitrust laws in the United States District Court for the District of Utah, Central Division, claiming that they were excluded from the vanadium industry by this same conspiracy and as a result of respondents' activities which are set forth in this brief. A jury returned a verdict in favor of Nisley & Wilson in this action and found that he was excluded by respondents' conspiracy to monopolize and to exclude him as a competitor. The jury verdict, and the judgment entered thereon, was recently affirmed by the Tenth Circuit in the case of *Union Carbide and Carbon Corp. v. Nisley* (10 Cir., 1961), 1962 Trade Cases, Par. 70,222, page 75,805.

After Nisley and Wilson were caused to close their mill, they sought to return to operation by seeking MRC aid, whereupon they were referred to Burwell, USV agent for MRC, who told him that the only condition under which Nisley would be supplied ore purchased by USV for the government account was that the oxide produced from the ore be returned to USV. (R. 660-663.) USV, as agent for MRC, subsequently terminated its contract with Nisley sooner than it terminated its contract with VCA. (R. 666.)

Mr. Burwell's testimony on the policy of excluding all existing and potential competition to Union Carbide and VCA was corroborated by the contemporaneous documents. (Pl. Ex. 33; R. 144, 173; Pl. Ex. 34, R. 146, 197; Pl. Ex. 35; R. 2114, 218; Pl. Ex. 36, 151, 227; Pl. Ex. 37, 152, 243; Pl. Ex. 64; R. 2147, 591.)

VCA knew of USV's plans (Pl. Ex. 55; R. 2133, 324) and carried on their own preemptive acquisitions. (Pl. Ex. 39; R. 2121, 247.)

**D. Petitioners' attempts at entry into the vanadium industry**

**1. There Was an Admitted Policy by Respondents to Exclude Petitioners**

Mr. Burwell, in testifying on Union Carbide's refusal to supply petitioners with vanadium oxide in November, 1943, stated that the **ONLY** reason petitioners could not obtain vanadium oxide from Union Carbide was that Union Carbide, pursuant to its conspiracy with VCA, wanted petitioners out of the vanadium business. He testified:

> "Q. (By Mr. Alioto.) Did you know at that time that Mr. Leir, or the Continental Ore Company, were

trying to buy—was trying to buy vanadium oxide from your company?

A. Oh, yes, I heard that at that time.

Q. Do you know why they would not sell it to them?

A. Well, I heard exactly that they did not want to sell vanadium to Mr. Leir because they wanted to keep him out of the vanadium business. *No other reason.*" (R. 547; emphasis added.)

Mr. Burwell further testified that it was the corporate policy of Union Carbide to keep Mr. Leir out of the vanadium business:

"Q. Now, you testified, did you not, that you had heard that Union [Carbide] did not want to sell vanadium to Mr. Leir because they wanted to keep him out of the vanadium business?

A. That's right.

Q. Now, who told you this, Mr. Burwell?

A. Oh, I heard that from Mr. Van Fleet, I heard that from—I heard that in a dozen conferences. I don't recall exactly which one—in the building, 30 East 42nd Street, New York City.

Q. Sort of a rumor?

A. It was my business to be in those meetings. They weren't formal meetings. I heard it from Mr. Van Fleet, I heard the reference to Mr. Leir—I had never met Mr. Leir—I knew nothing of his business excepting it came up second-handed—I heard from Mr. Jacobi.

Q. (By the Court.) Did any of these corporations, now, that you were connected with, make an order, a formal order on policy to that effect, that you know of?

A. No, your Honor. No smart lawyer would let a corporation make a formal order in writing of that

kind of thing. One of our instructions was never to write anything down like that." (R. 611.)

Mr. Burwell further testified that when he proposed a plan for the recovery of uranium, which is found in the same ore which produces vanadium, as the primary metal from the ore, in order to lower costs and stimulate the production of uranium on the Colorado Plateau, that Mr. Bransome told him that his plan would have to be rejected because it would allow vanadium as a by-product to be available in abundance on the free market and thus allow independent competition in vanadium. (R. 222-226.)

Mr. Burwell testified:

"... Mr. Bransome said, 'Blair, supposing—' '... these independent producers of ore had vanadium and uranium ore and brought their ore up to this central plant that you propose. The vanadium then would be turned back to them to sell or to dispose of, isn't that correct?' I said, 'Yes, that's correct.' I said, 'We cannot in this particular emergency deny any person the right to get vanadium back; that this situation had now become bigger than either the Unioin Carbide or the Vanadium Corporation of America in my estimation.'

Then he asked this: 'What would happen if somebody like Continental Ore or Mr. Leir shipped some ore to this central plant? Would he get the vanadium back?'

I said: 'Surely, he would.'

'So would anybody else who owned the ore. They would all have to have the same right.'

Mr. Bransome said, he paced back and forth in his office, he said, '*That would put Mr. Leir in the vanadium business and that is what we are trying to keep him out of.*'

> And I looked at Ted and I turned around and walked out of the door. And that was the end of the conversation.
>
> The plan was never put into effect." (R. 225-226; emphasis added.)

Shortly after this conversation, Mr. Burwell recounted the conversation in a memorandum dated January 22, 1948, to Mr. H. D. Kaiser of the Atomic Energy Commission. (Pl. Ex. 58; R. 2141, 531.)

There also was direct evidence from VCA's own files that it intended to exclude petitioners from the vanadium business, and that it entertained commercial arrangements with Apex to achieve the desired objective at a time when Apex was operating under its contract with petitioners. This will be discussed further below. (Pl. Ex. 62; R. 163-169, 584.)

**2. There Was Direct and Circumstantial Evidence That Respondents Prevented Petitioners From Obtaining a Steady, Dependable Supply of Vanadium Oxide, Interfered With Petitioners' Relations With Their Oxide Suppliers, Interfered With Petitioners' Manufacturing Associates and Caused Petitioners' Elimination From the Canadian as Well as the Domestic Vanadium Market**

**a. Period of Apex Contract (1938-1942)**

The contract between Apex and petitioners was dated July 1, 1938. (Pl. Ex. 117; R. 2190, 1050.) It was to remain in force for a period of fourteen years. (Id.) Production under this agreement was not actually begun until approximately August, 1940. (R. 1062.) Although respondents were supporting each other on prices and vanadium oxide supplies under the Maggie C and Dry Valley Agreements, the record showed a concerted refusal to sell

vanadium oxide to petitioners or to Apex during this critical period of first entry.

**(1) Refusal of Respondents to Sell Oxide to Petitioners**

Petitioners' requests for oxide supplies from VCA in 1939 were rejected. (Pl. Ex. 132; R. 2252-2260, 1245.) Some vanadium oxide supplies were surreptitiously received indirectly from Electromet Sales through a Mr. Poliakoff for a short time. (R. 1228; Df. U's Ex. U-5-L; R. 588, 1228.) Mr. Leir could not get this material directly. (R. 1228.)[10]

The estimated capacity of Apex's ferrovanadium production was approximately 416,000 pounds a year or between 30,000 to 40,000 pounds per month. (Pl. Ex. 146; R. 2270 at 2272; 1320; Wolf, R. 856; Leir, R. 1113. See also Pl. Ex. 140 for Id., R. 544, 1262.)

On March 1, 1940, Apex requested prices on quantity lots of vanadium pentoxide from VCA. (Pl. Ex. 63; R. 170, 778.) No reply was received. (Id.)

On April 8, 1940, Apex requested a response. (Id.) VCA responded to Apex that they had "no material to offer". (Id. at R. 171.) In October, 1940, in reply to an obvious request, Electromet Sales informed Apex that it could not supply Apex with oxide. (Pl. Ex. 128; R. 189-190, 1239.) Yet, at this very time, USV was supplying VCA with toll milled vanadium oxide at a below cost 75¢ a pound. (Pl. Ex. 8; R. 2074, 117.)

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[10]The third page of Exhibit U-5-L shows specifically that the sales were *not* between Electromet Sales and petitioners, but between Electromet Sales and Poliakoff. (Df. U-5-L; R. 588, 1228.) Mr. Leir testified that he could *not* get this material directly. (R. 1228.)

Thus, during that period, Apex's production did not include a single pound from respondents, who held over 90% control of the sources of supply.

The sporadic supplies petitioners were able to acquire were totally inadequate for Apex's continued production of ferrovanadium. (Pl. Ex. 144; R. 2266, 1313; Pl. Ex. 145; R. 194, 1315; Pl. Ex. 146; R. 2270, 1320; D's V's Ex. V-1-Q, R. 2512A, 1145.) Just prior to Apex's notification to Continental on January 27, 1942 (Df. V's Ex. V-1-Y; R. 2519, 1173) and on February 13, 1942 (Df. V's Ex. V-1-Z; R. 602, 1174) of Apex's desire to terminate production, Apex was in short supply of vanadium oxide. In fact, petitioners supply situation was so drastic that they were requesting the intervention of the government in order to obtain oxide from respondents. (Pl. Ex. 144, 145, 146, supra.)

On June 14, 1941, petitioners wrote to Electromet for supplies of vanadium oxide for shipment to Apex. (Pl. Ex. 77; R. 176, 776.) No response was received (Id.). On June 16, 1941, Mr. Leir requested of Electromet that Apex be allowed to convert vanadic acid for the account of Electromet (Id.). This offer was rejected (Id.). On June 16, 1941, Mr. Leir sent a similar request to VCA. (Pl. Ex. 132; R. 2261-2263, 1245.) VCA did not even bother to reply.

On July 7, 1941, petitioners requested that the Office of Production Management intervene in their behalf to secure oxide for them from respondents. (Id. at R. 2265.) Both respondents declined to supply petitioners (Id.).

As a result, in September, 1941, Apex wrote to Mr. Leir that it could not expand its production because of the deficiencies in its sources of supply. Apex wrote:

". . . for as you know we are not getting a sufficient quantity to run our present facilities on half time." (Df. V's Ex. V-1-Q, R. 2512A.)

There can be little question that petitioners were finding it impossible to secure adequate supplies to permit production under its Apex agreement.

From October to December, 1941, petitioners frantically attempted to obtain oxide. Having been turned down by respondents, petitioners centered their attention on obtaining acid from the Defense Plant Corporation Monticello Plant, which was under the administration of VCA. (Pl. Ex. 144; R. 2266-2270.)

On December 13, 1941, approximately one month before Apex notified petitioners of their intention to cancel their arrangement, Apex wrote the Defense Plant Corporation requesting a share of the Monticello oxide production.

Apex stated:

". . . However, we cannot make use of all of our production facilities *due to the lack of raw material* which is fused vanadium pentoxide, and therefore, we would appreciate greatly if you would make it possible for us to secure from the new plant reasonable tonnage of the Vanadium Pentoxide for conversion to Ferro Vanadium." (Pl. Ex. 144; R. 2266.) (Emphasis added.)

And again on December 26, 1941, Apex informed the Vanadium Division of the Office of Production Management:

". . . Our capacity for the production of this material is about 50,000 to 60,000 # of V contained per month but at the present time we are producing only a frac-

tion of this capacity *due to lack of raw material.*" (Pl. Ex. 146; R. 2271-2272.) (Emphasis added.)

These requests were made by Apex at the urging and insistence of Mr. Leir. (Id. R. 2273-2275.) And Mr. Leir himself testified:

"Q. (By Mr. Alioto.) Mr. Leir, in any event, were you having difficulty getting enough of the raw material to supply the Apex contract at this time?

A. My difficulties, or Apex difficulties, if you want to put it this way, to obtain a regular source of supply for raw material had already started, yes.

Q. Were you ever able under the Apex contract up to the time of its termination to get a regular dependable source of vanadium oxide?

A. I was not.

Q. What reasons were assigned by Apex for wanting to get out of the contract?

A. One of the reasons was the inability to obtain such a regular supply." (R. 1079.)

An officer of Apex Smelting, Mr. William R. Bayer, brought to the trial by respondents, admitted that "we just couldn't go out and get the supply" (R. 1301) and that Apex was not operating at full capacity because of the lack of raw materials. (R. 1319.)

Mr. Bransome, President of VCA, as late as June, 1941, foresaw no *shortage* of vanadium. (R. 1072-1079.) Yet during this period petitioners were refused oxide supplies by both respondents and their manufacturing associate, Apex, was experiencing difficulty in obtaining supplies.

**(2) Respondents Interfered With the Independent Oxide Suppliers Who Were Petitioners' Source of Supplies**

During the Apex period, petitioners' or Apex's vanadium oxide suppliers were: Mr. Ackermann (The Loma Mill), Blanding, Monticello, Mr. Wm. G. Morrison (original operator of The Loma Mill) Nisley & Wilson, and Shattuck (North Continent Mines). (Pl. Ex. 118; R. 2202, 1295, 1065.) These were all independent suppliers. The respondents interfered with these suppliers during the Apex period, with the possible exception of North Continent who shipped approximately 5 tons a month, as contrasted to the capacity of Apex, which was estimated to be between 25 to 30 tons of V per month. (Pl. Ex. 146; R. 2272.)

*(a) Loma Mill:*

Mr. Burwell described the predatory acts committed by USV against this mill to keep the ore "away from this mill" and eliminating this supplier from the market. (R. 303-306; See this brief page 33.) This mill "closed down for lack of ore" (R. 306) as a result of these tactics.

*(b) The Blanding Mines Production:*

As was heretofore shown VCA usurped the Blanding Mine Production from Apex and petitioners by direct interference with this source of supply. (See this Brief page 34.) The Blanding Mill had been supplying Apex with vanadium oxide shipments from August, 1940, to January, 1941. (Pl. Ex. 118; R. 2209, 1065; Pl. Ex. 131; R. 2229-2233, 1242.) The relationship between Blanding and Apex was satisfactory. (R. 1746.) In the Fall of 1941, VCA negotiated the acquisition of the vanadium ore

claims of Blanding's lessor, Garbutt. (R. 1950; R. 1750.) Mr. Bransome, President of VCA, went to Los Angeles where he sought out Mr. Garbutt and personally acquired the claims on or about January, 1942. (R. 1949-1950.) It is significant here that Blanding notified Apex that it would no longer sell oxide to Apex on January 9, 1942, less than 20 days before Apex capitulated and notified petitioners that Apex desired to terminate the agreement. (Pl. Ex. 131; R. 2239, 1242; see Pl. Ex. 127; R. 2222, 1239.)

Blanding wired Apex on January 9, 1942:

> "At the advice and recommendation of the owner of our claims, it will be necessary for us to dispose of our product here. We regret very much that we will be unable to deal with you." (Pl. Ex. 131; R. 2239.)

On January 12, 1942, Apex replied:

> "We regret exceedingly to note that you are compelled to dispose of your material in your district, as we enjoyed doing business with you, and *we were looking forward to receiving increasing amounts from you.*" (Id.) (Emphasis added.)

Petitioners desperately pleaded with Blanding for its production. (Pl. Ex. 131; R. 2239-2251.) However, VCA obtained Blanding's oxide production for the price of $1.10 per pound, f.o.b. mill. (R. 1759.) Higher prices offered by petitioners were turned down by Blanding, which was, by that time, under the control of VCA. (Pl. Ex. 157; R. 2341, 1791; R. 1738-1740, 1758-1759.) On March 28, 1942, petitioners offered Blanding $1.20 per pound, 10¢ per pound more than VCA. (Pl. Ex. 131; R. 2246.) Mr. Leir pleaded with Blanding that "you must help us stay in business now, for your sake as well as ours". (Pl. Ex.

136; R. 2244, 1253.) Nevertheless the Blanding production went to VCA.

*(c) The Nisley and Wilson Mill:*

Mr. Brown's defunct Gateway Mill was acquired by Nisley and Wilson in the Spring of 1941. This was the mill Mr. Burwell had been instructed "to discourage" in "any way we could". (R. 292.) The mill had gone broke in 1940 because of respondents' activities. (See this Brief page 31.) Nisley and Wilson first attempted operations in May, 1941. (R. 646.) Their operation was thwarted by Mr. Burwell who subjected Mr. Nisley's red cake to short weight. (R. 651.) Mr. Nisley then contacted Continental, and commenced production of black oxide in or about October, 1941. (R. 652.) Nisley started shipping 2 or 3 tons a month to Apex. (R. 2209, 693-694.) The stripping of the mines at Gateway, which Mr. Burwell had accomplished "to keep *another vanadium's operation* from getting started" (R. 292-293) and the winter months caused Nisley trouble and his mill experienced intermittent operations from October, 1941 to March 20, 1942. (R. 654.) The mill closed March 20, 1942 for a short period and then reopened in May, 1942. But in June, 1942, just one month after the mill reopened, Mr. Burwell started to divert the miners who were supplying ore to Nisley to Uravan. Mr. Nisley closed down in October, 1942 and remained closed to April, 1943. (R. 657, 662-663.)

*(d) Monticello:*

These supplies were limited. They consisted of only four shipments from April to September, 1941. (R. 2206.)

**(3) Respondents Interfered With Apex Who Cancelled Its Contract With Continental and Agreed With VCA Never to Enter the Vanadium Industry Again**

Petitioners' unsuccessful attempts to secure oxide supplies from respondents from 1938 to 1942 have been described hereinabove. (This Brief, pages 40-43.) On January 27, 1942, Apex notified petitioners that it was discontinuing its relations with them. (Df. V's Ex. V-1-Y; R. 2519, 1173.)

However, on February 16, 1942, petitioners had received assurances of governmental cooperation in obtaining additional supplies of vanadic acid and attempted to convince Apex to remain in ferrovanadium production. (Df. V's Ex. V-2-A; R. 603, 1173.) But only four days after this letter was written, VCA held a meeting with Apex which resulted in direct commercial arrangements between Apex and VCA. An agreement was made between Apex and VCA whereby Apex agreed to stay out of the vanadium business, and furnish VCA with Continental's list of suppliers and, in return, VCA would purchase 150,000 to 200,00 pounds of dioxidizing aluminum ingots from Apex over a period of six or seven months for $10,250-$27,000. (Pl. Ex. 62; R. 163-169; R. 1335-1337, 1947-1949.)

This evidence showed that VCA had been in contact with Apex on or about February 20, 1942. (Id.) These negotiations were discontinued. (Id.) However, VCA voluntarily resumed contact with Apex on or about March, 1942. (Id. at R. 167.)

A VCA interoffice memorandum stated:

> ". . . as I had not heard further from Mr. Christiansen [Apex] in this regard I had Larry Johnson cas-

> ually contact him by phone and tell him that I had not received the information that he promised to send." (Pl. Ex. 62; R. 167.)

As a result of this exchange, Apex offered VCA their equipment and offered to supply VCA the names of Mr. Leir's suppliers of ores and oxides. (Id. at R. 168-169.) The commercial arrangements for the purchase of the aluminum ingots by VCA were then made between Apex and VCA. A VCA memorandum dated April 14, 1942 states:

> "We [Apex] had an interesting discussion concerning low copper grained aluminum which they produce and release with necessary priority approval and I therefore turned him over to our Purchasing Department with regard to this item." (R. 169.)

Apex subsequently terminated its association with petitioners. In January, 1943, Mr. Leir again requested Apex to resume production. (Df. V's Ex. V-2-C; R. 2523, 1193.)

**b. Petitioners' Attempts to Persist in the Vanadium Business During the War Period After the Loss of Apex (June, 1942 to November, 1943)**

Despite the loss of Apex as a manufacturing associate, petitioners persisted in their attempts to succeed in the vanadium business. First they arranged to have Apex continue production from January to June, 1942. Though petitioners were notified by Apex on January 27, 1942, that it was discontinuing its relationship with them, production continued until June, 1942, because Apex was advised by its attorneys that petitioners had a binding agreement with Apex. (Pl. Ex. 62; R. 675-676.) To avoid a lawsuit because of its breach of its contract with petitioners, Apex agreed to convert vanadium oxide for Continental

for a three month period, March to May 1942. (Pl. Ex. 122; R. 2215-2221, 1096.)

In August, 1942, petitioners commenced an independent vanadium operation. They rented a small warehouse in Long Island where they installed a grinder and mixer and started to produce Van-Ex, a vanadium compound in which vanadium oxide was mixed with a flux for direct entry into the steel bath. (Leir, R. 1192-1193, 1197-1198; Wolf, R. 840-845.) This product was in demand by Atlas Steels, a large Canadian Steel Mill. (Pl. Ex. 79; R. 2169 at 2173-2174, 779.)

Petitioners made the Van-Ex by mixing vanadium oxide with exothermic agents and flux. (R. 840-845.) It is noted that respondent Electromet cautioned its salesmen not to sell vanadium oxides with a reducing agent because this product posed an economic threat to their large investments in the furnaces and plants. (Pl. Ex. 73; R. 2160, 631.) Petitioners needed only a small pebble mill to make Van-Ex. (R. 1211.)

**(1) The Loss of Independent Suppliers During This Period**

The Nisley and Wilson Mill had gone out of production in October, 1942. (R. 655-662.) After that time, its production was placed under the control of USV as agent for MRC, under protest by Nisley.

In the Spring of 1942, USV was appointed as agent for the Metal Reserve Company (MRC), a governmental corporation organized to purchase vanadium oxide for the government. (Df. U's Ex. U-D; R. 2369, 373.)

The chief officers of USV were made the chief officers of USV as agent for MRC. Mr. Van Fleet was Vice Presi-

dent of USV as agent for MRC from 1942 to 1944. (R. 367-368, 338, 2363, 2168.) Mr. Burwell was made Supervising Engineer and Mr. Hill and Mr. Haldane, both USV officers, were named Mr. Burwell's Chief Assistants. (R. 1535, 228.) Mr. G. Donald Emigh, another USV officer, was made Assistant to Mr. Van Fleet in charge of the MRC Agency. (R. 1605.)

Under this agency contract, USV was placed in charge of the government's vanadium ore buying program. (Id.) It was given the authority to pay reasonable prices for the ore, the price not to exceed 50¢ per pound (Id.). The contract specifically provided that USV was to comply with all applicable federal, state and municipal laws, rules, regulations and orders. (Id. at R. 2377, para. 7.)

However, USV, as agent for MRC, established 31¢ as the base MRC price so that it would not be competitive with the 31¢ price USV and VCA had fixed as the price for the ore they purchased for their respective private uses and not for the government account. (R. 1559-1569.) Of course, if USV paid more for MRC ore it would have been required to meet the price for its private ore, which it could not do without violating the price fixing agreement it had made with VCA.

Between May, 1942 and January, 1944, when the Agency power was terminated, *every independent vanadium oxide mill on the Colorado Plateau was turned into an ore selling operation except Nisley and Wilson, and that mill's production was placed under USV's control. By* January, 1944 *not one independent oxide mill was in production.* (Pl. Ex. 18; R. 134, 125; Burwell, R. 209.)

**(2) In 1942 and 1943, Respondents Continued to Refuse to Sell Vanadium Oxide to Petitioners**

In early 1943, Mr. Leir hoped that he could obtain vanadium supplies from the War Production Board. (R. 1194-1196.) However, in March, 1943, MRC informed Continental that it could not fill Continental's order of 20,000 pounds of vanadium oxide. (Df. U's Ex. U-4-C; R. 567, 940.) Thereafter, in April, 1943, Continental Ore wrote Electromet:

> "We refer to the allocation made out by the WPB under the date of April 7 in our favor in the amount of
>
> 10,000 lbs. of metallic V contained (17,843 lbs.) contained $V_2O_5$
>
> in Vanadium Concentrate.
>
> "We would very much appreciate your kindly informing us when this material is expected to be ready for shipment so that we may give you our shipping instructions." (Df. U's Ex. U-4-D; R. 569, 942.)

Electromet honored the allocation. (Df. U's Ex. U-4-E; R. 570, 943.) MRC also shipped 10,000 pounds to Continental. (Df. U's Ex. U-2-P, R. 708-709; U-2-Q, R. 709-710; U-3-X, R. 925-926.) Thereafter, on April 30, 1943, Mr. Leir was billed at $1.15 a pound for the contained vanadium oxide. Continental protested the price of $1.15 since $1.10 was the quoted MRC price. (R. 948; Df. U's Ex. U-4-I; U-4-J; U-4-K; R. 575-578, 949-951.)

On May 21, 1943, Mr. Leir wrote Mr. Remmers of Electromet:

> ". . . We are perfectly willing to sign a contract with you for our requirements until the end of the year. At present, these requirements are estimated to amount to 10,000 lbs. of V contained in pentoxide per month." (Df. U's Ex. U-4-M; R. 581, 955.)

Electromet rejected the request, and stated:

> ". . . we will be unable to accept your order at this price since the regular market price of this material is $1.15 per pound of $V_2O_5$, contained in the compound." (Df. U's Ex. U-4-N; R. 581, 957.)

Finally, on June 1, 1943 Electromet, "in order to close the files on the subject" agreed to take the $1.10 price and refused to sell any more vanadium oxide to petitioners. (Df. U's Ex. U-4-Q; R. 584, 960.)

**(3) The Loss of Relations With Climax Molybdenum Co.**

Petitioners' request for vanadium oxide from Electromet commencing in April, 1943, was for their expected continued relations with Climax Molybdenum Co. (R. 1018, 978.) Petitioners and Climax had entered into an agreement on February 10, 1943. (Pl. Ex. 111; R. 182, 1014.) Under this contract Climax was to convert 20,000 pounds of vanadium in vanadium oxide into ferrovanadium for petitioners.

At the trial, petitioners made an offer of proof to prove through Mr. Martin Wolf, petitioners' Vice-President, that Union Carbide threatened reprisals against Climax if Climax continued negotiations with petitioners and persisted in the vanadium business. This evidence was excluded by the trial Court.

The offer of proof, in part, as stated by counsel for petitioners to the trial Court, was as follows:

> "Mr. Arrouet said further that the plaintiff, the Continental Ore Company, had no business in the vanadium business. Mr. Arrouet said further to the plaintiff that they had better stay away from Climax and not try to make any arrangements with Climax,

and they were then entering negotiations with them, as the offer of this evidence will tend to show.

"Mr. Arrouet told them to stay away from Climax, and, if Climax got into the business, that Union Carbide would undertake a reprisal against the Climax Molybdenum Company.

"He said, in that connection, that Union Carbide had available at its plant in California, its tungsten operation in California, quantities of molybdenum that they would use against the Climax Molybdenum Company if that company entered into negotiations with the plaintiff to manufacture ferrovanadium for the account of the plaintiff or under a joint operating arrangement with the plaintiff.

"At that juncture this witness, we offer to prove, that this witness said, in substance or effect, 'Does it mean, then, Mr. Arrouet, that the picture of the world is something like this: God told Electromet to make vanadium, tungsten, ferro-manganese and God told Vanadium Corporation to make ferrovanadium and that nobody else would be allowed into these fields?' To which the employee of Electromet Company and the Union Carbide affiliate answered: 'That was just about it.' And 'That's the way it was going to be.'"

"We further offer to prove at this time, that Mr. Arrouet then made an offer which involved giving the plaintiff a little business in the Canadian market if he promised to stay out of it thereafter."

* * * * *

"Mr. Alioto. May I supplement the offer, if your Honor please? We offer to prove at this point that the Canadian Government was totally oblivious to the purpose for which its agent, the Electro Metallurgical Company of Canada, made its decision not to deal

with the plaintiff and to eliminate the plaintiff from the Canadian business." (R. 828-831.)

**(4) Complete Prevention and Elimination of Petitioners From Exporting Their Products to Canadian Customers**

Atlas Steel, Ltd., a very large Canadian producer of steel, was one of petitioners' largest Canadian customers. (R. 802.) Petitioners' records show shipments of Van-Ex to Atlas Steels in every month from March of 1942 to the end of the year. (R. 802-803.) Shipments stopped beginning in 1943. Petitioners offered to prove that this exclusion was pursuant to the overall conspiracy between respondents Union Carbide (and its affiliate Electro Metallurgical Company, an American Company with head offices in New York) and VCA to monopolize the entire vanadium business, and that the elimination of petitioners by cutting off their Canadian customers, through control of the Canadian subsidiary was another act in furtherance of that basic conspiracy. The evidence with respect to respondents' acts concerning the Canadian situation was not admitted and consequently was withheld from the jury. As a result, the record for review consists of an offer of proof made by petitioners' counsel which appears at pages 801-840 of the record, and an exchange of correspondence between petitioners and Electromet of Canada which appears in Volume IX, pages 438-468 of the record. (Pl. Ex. 80-109 for Id.; R. 438-468, 805-839.)

Petitioners offered to prove that (R. 826-828):

"Now, if your Honor please, we offer through this witness to prove the following facts, that at the end of 1942 and 1943 the Electro Metallurgical Company of Canada, which had been appointed as the purchasing agent by an agency of the Canadian Government,

that is, the purchasing agent for vanadium, determined that it would not permit any further shipments from the Continental Ore Company into the Canadian market. In that connection we offer to prove that he was acting under instructions from the officials of Union Carbide or its affiliate in order to eliminate the plaintiff from the Canadian market."

* * * * *

". . . We tentatively offer to prove in any event that it was the Carbide officials and employees which directed their wholly-owned and controlled subsidiary organization, the Electro Metallurgical Company of Canada, Ltd., to eliminate the plaintiff from the Canadian market, to take away his Canadian customers, and to supply those customers between the Vanadium Corporation of America and Union Carbide.

"We offer to prove in this connection that it was the intent and purpose of the Carbide officials and employees to use the Canadian agency for the purpose of restraining the plaintiff's trade, and specifically for the purpose of carrying out the conspiracy to restrain and to monopolize the vanadium industry in the United States and Canada. He is one of the means in connection with that monopolization and restrain(t) to eliminate the Continental Ore Company from the business."

When petitioners requested an allocation from the Canadian subsidiary to permit them to ship Van-Ex to fill an order of Atlas Steel, the allocation was refused. (Pl. Ex. 100; R. 458, 823; Pl. Ex. 102; R. 460, 823; Pl. Ex. 104; R. 462, 825-826; Pl. Ex. 107; R. 465, 826.) However, VCA was permitted to ship and actually was shipping into Canada during the same period of 1943 and 1944. (Pl. Ex. 17; (1943) p. 5, R. 127; 124, (1944) p. 6, R. 133, 124.) As

a result, petitioners' attorney, a Mr. Code, contacted Mr. Bateman, the Metals Controller of Canada, to complain of the discrimination and elimination of petitioners from the Canadian market. Mr. Code was instructed to have petitioners contact a Mr. Walker of Electromet in New York City who would handle the problem. Petitioners wrote to Mr. Walker. (R. 848; Pl. Ex. 80; R. 438, 805.) Subsequently, and without solicitation, petitioners received a telephone call from M. D. Arrouet in New York City from the Electromet and Union Carbide offices at 30 East 42nd Street in connection with this complaint. (R. 848-850; Pl. Ex. 81; R. 438, 818, 834.) After additional unsuccessful requests to the Union Carbide Canadian subsidiary for permission to ship to petitioners' Canadian customers (Pl. Ex. 82-98; R. 449-456, 818-822) petitioners' Mr. Wolf met with M. D. Arrouet at the Electromet and Union Carbide offices in New York in protest of the continuous refusal to allow petitioners to ship into Canada. (R. 847-850; Pl. Ex. 109, R. 467, 834.) Petitioners offered to prove the conversation quoted above. (R. 829-831; Pl. Ex. 109; R. 467, 834.)

**c. Petitioners Persisted in Their Attempts to Enter the Vanadium Industry Following the End of Vanadium Oxide Stockpiling Period. November, 1943 to 1946**

**(1) Respondents Continued to Refuse to Sell Vanadium Oxide to Petitioners, Who Were Unable to Succeed in Their Vanadium Venture With Imperial Paper and Color Corp.**

In November, 1943, the emergency shortage of vanadium oxide was over. (Pl. Ex. 113; R. 184, 1019; Df. U's Ex. U-P; R. 407-414.) Vanadium oxide was in over supply. (R. 547.)

In January, 1944, petitioners entered into a contract with the Imperial Paper and Color Corporation. (Pl. Ex.

110; R. 2175, 1014.) Under the terms of this agreement, Imperial promised to enter into the production of ferrovanadium and appointed petitioners as its exclusive sales agent. (Id.)

Imperial never did produce ferrovanadium for the reason that it could not be assured of regular, steady supply of vanadium oxide. (Pl. Ex. 114, 115; R. 185, 2179, 1021, 1023.)

In November, 1943, petitioners made requests to both Electromet Sales and VCA for monthly supplies of oxide. (Wolf, R. 1012-1013; Burwell, R. 546-547; Pl. Ex. 40, 41, 42; R. 152, 153, 155, 1262, 1264, 1299.) These requests were jointly refused. (Pl. Ex. 42; at R. 154, 157.) The evidence very specifically showed that petitioners made these requests for vanadium oxide from the respondents in November, 1943, in order to supply their manufacturing associate, The Imperial Paper and Color Corp., with vanadium oxide. This supply of vanadium oxide would have permitted Imperial to start production of ferrovanadium under a contract which petitioners were negotiating with Imperial, which petitioners were positive they could make (R. 1013), and which they eventually made. (Pl. Ex. 110, R. 2175, 1014.) Mr. Wolf testified:

> "Q. (By Mr. Alioto) Now, Mr. Wolf, you were with Continental Ore Company in November of 1943, were you not?
>
> A. That's correct.
>
> Q. And you were with them at the time that the request was made in November to both Electro Metallurgical Sales Corporation and Vanadium Corporation of America to supply you with regular monthly supplies of vanadium oxide?
>
> A. That's correct.

Q. Now, what was the situation in November of 1943 with respect to contractual arrangements with any proposed manufacture of ferrovanadium? Did you have any at that time?

A. In November of '43?

Q. Yes.

A. We had a contract with Imperial Paper.

Q. Well, I think your dates may be a little awry, but to establish those definite dates on matters on which both—Mr. Archer. That's January, 1944, whatever the date is. We can develop that.

A. We had negotiations at that time which we were sure would lead to a contract with Imperial Paper, so we were trying to,——

Q. (By Mr. Alioto) All right. The contract was actually made in January of 1944, is that correct?

A. Yes. But we were trying to get a basis of raw materials for our negotiations for the forthcoming contract." (R. 1012-1013.)

The specific reason for respondents' refusal to supply petitioners at this exact time was that Union Carbide desired to exclude them from the industry. (Burwell, R. 546-547.) Burwell testified that Electromet did not sell oxide to Mr. Leir at this very time because respondents wanted "to keep him out of the vanadium business." (Burwell, R. 547.)

Imperial investigated all sorts of alternative sources of supply, including lead vanadate, flue dust from ocean going vessels, vanadium ash, and cuprodescloizite ores. (R. 877-907.) But Imperial concluded that there was not enough assurance of a steady, dependable source of supply to justify the manufacture of ferrovanadium. (Pl. Ex. 114; R. 185, 1021; Pl. Ex. 115; R. 2179, 1023.)

Therefore during the period 1938 to 1944, petitioners or their associates made the following requests for vanadium oxide from respondents:

| Date | Request | Action by Respondents |
|---|---|---|
| y 28, 1939[11] | 10,000 lbs. a year from VCA | No response |
| . 17, 1939[12] | 5,000 lbs. oxide from VCA | Refused[13] |
| . 17, 1939[14] | 4,000 lbs. ferro-vanadium from VCA | Refused[15] |
| rch 1940[16] | Vanadium Oxide from VCA | Refused[17] |
| . 17, 1940[18] | Oxide from Electromet | Refused[19] |
| ne 14, 1941[20] | Vanadic Oxide from Electromet | No response[21] |
| ne 16, 1941[22] | That petitioners be allowed to convert oxide for VCA | No response |
| ne 16, 1941[23] | That petitioners be allowed to convert oxide for Electromet | Rejected[23] |
| ly 16, 1941[24] | Through OPM, Vanadium Section, Petitioners asked for oxide from VCA | Refused |
| ly 16, 1941[25] | Through OPM, Vanadium Section, Appellants asked for oxide | Refused |
| ay 21, 1943[26] | That Electromet fill Continental's oxide requirements for the remainder of the year | Unable to accept[26] |
| ov. 16, 1943[27] | 10,000 to 15,000 lbs. Vanadium oxide from VCA per month, any fixed length of time | Refused[27] |
| ov. 17, 1943[28] | 10,000 to 15,000 lbs. vanadium oxide from Electromet per month any fixed length of time | Refused[28] |

[11]Pl. Ex. 132; R. 2258, 1245
[12]Pl. Ex. 132; R. 2259-2260
[13]Pl. Ex. 132; R. 2260
[14]Pl. Ex. 132; R. 2259-2260
[15]Pl. Ex. 132; R. 2260
[16-17]Pl. Ex. 63; R. 1239, 170-171, 778
[18-19]Pl. Ex. 128; R. 189; See Df. V's Ex. V-1-N; R. 2506, 1139
[20-21]Pl. Ex. 77; R. 176, 177, 776
[22]Pl. Ex. 132; R. 2261-2262, 1245
[23]Pl. Ex. 77; R. 176-177, 776
[24]Pl. Ex. 132; R. 2265
[25]Pl. Ex. 132; R. 2265
[26]Df. U's Ex. U-4-M; R. 580, 955; Df. U's Ex. U-4-N; R. 581, 957
[27]Pl. Ex. 40; R. 153, 269; Pl. Ex. 41; R. 154, 270
[28]Pl. Ex. 42; R. 155-157, 270

**(2) Respondents' Monopoly Power Caused the Small Oxide Producers to Cease Production in 1944**

*(a) Nisley & Wilson*

In December, 1943, Nisley & Wilson were notified that their MRC Tolling Agreement was being cancelled. (Df. U's Ex. U-2-U; R. 2440, 729.) However, on or about December, 1943 in instructions from MRC, USV had been given the discretion by MRC to extend Nisley & Wilson's MRC Tolling Agreement beyond January 1, 1944, if USV believed that Nisley & Wilson's program should be continued "in the interest of the procurement of *other* products than vanadium."[29] (Df. U's Ex. U-P; R. 408-409, 407.)

Nisley testified that the Nisley-Wilson Mill went out of production permanently in January, 1944, for the reason that the mill could no longer fight the monopoly control and tactics of respondents. (R. 667-668.)

Mr. Nisley testified:

"Q. Did you go back into business privately after January 1, 1944?

A. No, we did not.

Q. Why not?

• • •

A. We seriously considered it, and if the United States Vanadium had not stripped the mines of Gateway Alloys, there would have been no problem. We

[29]By the Fall of 1942, the United States had formed the Manhattan District to develop the Atomic Bomb. Union Carbide was appointed agent by the Government through the Union Mines Development Corporation, which was a subsidiary of Union Carbide. Like the USV-MRC agency, Union Carbide's officers were made officers of Union Mines. (Df. U's Ex. U-Q; R. 2397, 418.) The "other products" referred to in the discretion given USV by MRC was obviously uranium.

would have had plenty of ore supplied to do it, but the mines were still under contract to Metals Reserves Company——

• • •

I say, the mines were still under contract to Metals Reserves Company. In view of the things we had been up against, we felt we could not buck anymore and we closed down." (R. 667-668.)

*(6) Respondents Directly Thwarted Petitioners' Plan to obtain or erect a ferrovanadium plant on the Colorado Plateau*

In February 1944, Mr. Leir and the independent miners on the Colorado Plateau, including Mr. Bigler, one of the owners of Blanding Mine, met in Grand Junction, Colorado, to discuss the organization of a group of independent ore producers for the purpose of building a mill which would have assured sources of ore supply for it. (R. 1775-1777.) Mr. Leir came to Grand Junction on the urging of Mr. Bigler's associate, Mr. Dan Milenski. (Df. V's Ex. V-2-K; R. 2533-2544; 1715.) Mr. Leir offered to purchase Blanding's entire production and further promised that if Blanding produced 50,000 lbs. of vanadium oxide a month, "Continental undertakes to construct a plant in the State of Colorado for the utilization of its process for the manufacture of ferrovanadium." (Id., R. 2542.) Blanding questioned the organization of an association. (Id. at R. 2548-2549.) Mr. Leir replied:

"As long as your output is only 15,000 lbs. per month there are no particular difficulties with regard to our own outlets, but the moment you achieve a larger output, we would like to see an 'association" created, because the 'association' would give us a better

standing in the marketing of the finished product." (Id. R. 2251-2253 at 2252.)

But while the independent producers and Mr. Leir were formulating such plans, USV and VCA who foresaw the possibility of a competitive production, commenced plans to acquire and maintain control of the government mills which could be used in order to thwart such programs.

On February 29, 1944, Mr. Burwell wired Mr. Haldane that Brinker, Sitton and other promoters were trying to acquire the Durango Mill. (Pl. Ex. 37; R. 243.) When Union Carbide heard of these plans it moved swiftly and acquired the mill at a cost of approximately $75,000. (Pl. Ex. 38; R. 2119, 244.) USV at that time had an option to purchase the mill for its cost less depreciation. (R. 241.) Mr. Burwell testified that USV acquired the Durango Mill after this exchange of correspondence warning that the independents were planning to acquire the Durango Mill. USV "wanted the plant to keep control of the production of vanadium" (R. 241-247 at 246) and because these independents were trying to buy it. (R. 224.) One of the reasons for the acquisition of the Durango Mill was:

> "1. To maintain its position in the vanadium industry in the southwest. Repeated reports have reached this company of plans of outsiders to acquire the plant in the event United States Vanadium Corporation decides not to exercise its option. The injection of additional operators in this field would undoubtedly seriously disturb conditions in the vanadium industry in the post-war period." (Pl. Ex. 38; R. 2117, 2119.)

And on February 15, 1945, VCA acquired the Monticello Plant under a lease with the Defense Plant Corporation. (R. 2070.) With this acquisition all the vanadium oxide plants on the Colorado Plateau were controlled and operated by the respondents who, by then, enjoyed a 100% control of the production of ferrovanadium.

**(3) The Period 1946 and Thereafter**

On June 27, 1946, respondents were indicted for criminal violation of the Sherman Act. (R. 22, 30, 40.) On September, 1948 the indictment was dismissed and was superseded by an information. In 1946, after criminal action investigations had been started, Electromet Sales offered Continental requirement contracts for its *domestic* manufacturing requirements and even then limited the contracts only to petitioners' domestic requirements. (Df. U's Ex. U-4-X, R. 2459, 977; U-4-Y, R. 982; U-4-Z, R. 2461, 982; U-5-A, R. 983; U-5-B, R. 984; U-5-H, R. 997, R. 978-980.) They determined that no longer could they persist in their attempted entry into the vanadium business until the government action was finalized and the industry "opened up by government action". (R. 978-980.) Mr. Wolf testified that he considered such offers had come far too late:

> ". . . I don't think, first, that it is very good practice to base an investment and a business on raw materials procured from your competitors after your competitors have tried by all means possible to eliminate you from the market." (R. 979.)

**(4) Petitioners Experienced Outstanding Financial Success in All Fields of Minerals, Metals and Alloys Except Vanadium**

Petitioners' books and records showed in vanadium a growth of production and sales during the period 1939 to 1942. (Pl. Ex. 119, R. 2212, 1089.) Profits were made during this period. (Id., R. 2213.) Vanadium sales went from $60,000 in 1939 to $250,000 in 1942. Apex alone had produced 70,000 lbs. of ferrovanadium in 1941 and 28,000 pounds in 1942. (Id.) But petitioners' business suffered a severe decline in 1943 and the sales in 1944 and 1945 were token only. Whereas petitioners had shipped 71,555 lbs. of Van-Ex to Canada in 1942, these shipments fell to only 6,480 lbs. in 1943. (Pl. Ex. 79; R. 2169, 797.) Failure in this field was an exception to petitioner's outstanding successes in other minerals, metals and alloy fields. For example in 1942, petitioners sold $252,000 of fluorspar and $249,000 in vanadium products. (Pl. Ex. 125 for Id.; R. 539, 1106.) By 1945, petitioners' fluorspar sales had increased to $779,000 but their vanadium sales had dropped to $17,529. By 1957, petitioners had sold over $6,500,000 of fluorspar.

Petitioners expanded with other products such as coal, borite, fertilizers, lead and zinc, cement, aluminum, iron ore, asphalt, magnolith. Continental's group of companies operating in these fields grew from a net worth of $36,674 in 1939, when vanadium was the principal product, to a net worth of $5,339,240 in 1957. (Pl. Ex. 124 for Id.; R. 537, 1103.)

### 5. OPINION OF THE COURT BELOW

The Court below affirmed the judgment against petitioners on the ground that even assuming *all* petitioners' contentions, the trial Court should have granted a directed verdict for respondents as a *matter of law*. The lower Court held that the directed verdict should have been granted because petitioners had not proved a causal connection between their injury and respondent's violations of the antitrust laws, both of which the lower Court *assumed to have occurred* for the purposes of its opinion.

Although, for the purposes of its opinion, the lower Court assumed that the conspiracy alleged by petitioners occurred and that petitioners were in fact eliminated from the vanadium industry, it did not review the evidence as a whole, but, instead, limited the case to four specific periods of time:

(1) *The Apex contract period* involving the production of ferrovanadium: (2) *The Van-Ex period* which followed the Apex cancellation and which involved the distribution and sale of Van-Ex: (3) *The Climax arrangement* which the lower Court arbitrarily limited to one contractual arrangement; and (4) The 1944 and 1946 period in which petitioners attempted to manufacture ferrovanadium on a permanent basis with *Imperial*. In considering these periods, the lower Court sat as a trier of fact and rationalized the evidence, drawing inferences and making factual determinations which are reserved for triers of fact, the jury in this case, and not for appellate Courts.

The lower Court further held that petitioners were required to prove that their continuous lack of steady sup-

plies was solely the result of respondents' refusals to deal with them and respondents' efforts to prevent them from obtaining raw materials elsewhere, and, as a factual determination, held that there was no evidence upon which reasonable men could make such findings. In making this factual determination, the lower Court reviewed the record and resolved all factual conflicts in favor of respondents. It failed to resolve factual conflicts in favor of petitioners as it was required to do under rules of judicial review and failed to give petitioners the benefit of every inference or presumption to which the evidence and the law entitled them.

The Court below found:

(1) *Apex Period:* Since respondents had not been requested to sell vanadium oxide since March, 1940, there could be no causal relationship between petitioners' lack of supplies and the Apex contract termination in January, 1942;

(2) *Van-Ex:*

(a) Petitioners' refusal to buy Nisley & Wilson's production in June, 1943, October, 1943, and January, 1944 precluded petitioners from arguing that respondents prevented the acquisition of raw materials at this time;

(b) Petitioners' inability to sell Van-Ex to their Canadian customers because of the action of one of Union Carbide's subsidiaries was the result of governmental action and, therefore, could form no part of petitioners' proof;

(3) *Climax:* The record was limited to one single contract and an offer of proof to show that Union Carbide

had threatened petitioners and Climax with reprisals "appears to be directed against a corporation with which Continental had no business, since the nature and existence of the alleged 'pending negotiations' are not shown by the record.";

(4) *Imperial:* The failure to request supplies from respondents during the period January, 1944 to 1945 prevented petitioners from claiming injury because of respondents' joint refusal to deal with petitioners. The lower Court found as a factual determination, that though in November, 1943 petitioners had sought vanadium oxide, some Nisley & Wilson production was available to petitioners and, therefore, respondents' joint refusal had no exclusionary effect on petitioners.

These determinations were factual conclusions the lower Court drew from the evidence presented. In so doing the Court below reviewed the evidence of "causation", resolved factual conflicts against petitioners and drew inferences and presumptions from the evidence which reasonable men could find otherwise. The fact that the trial Court submitted the case to the jury after two motions for a directed verdict had been made by respondents is an indication that even the trial judge thought that the evidence presented a factual jury issue.

In deciding the case in this manner, the Court below failed to even consider the many errors which petitioners raised as points of appeal in their Appeal to the Ninth Circuit and, which, without any doubt, had a strong effect on the jury verdict. For this Court's information only, these alleged errors are set forth in Appendix A to this Brief.

## VI.

### SUMMARY OF THE ARGUMENT

A purpose of the Congressional support of private actions under the antitrust laws is to afford a redress for wrongs done against a persistent and capable competitor who has been excluded from the competitive market pursuant to a conspiracy to monopolize. *Standard Oil Co. v. United States,* 221 U.S. 1 (1911); *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207. The antitrust laws provide free and open access to the market place free of such a conspiracy and free of acts of impact committed pursuant to such a conspiracy. *American Tobacco Co. v. United States* (1946), 328 U.S. 781; *United States v. Griffith,* 344 U.S. 100 (1948); *Baush Machine Tool Co. v. Aluminum Co. of America* (2 Cir., 1934), 72 F.2d 236.

Congress in adopting the Sherman Act created a statutory cause of action providing for the recovery of damages from wrongdoers who interfere with free access to the market place. *United States v. Addyston Pipe & Steel Co.* (6 Cir. 1899), 85 Fed. 271, 279.

In the instant case, respondents acquired a 100% monopoly in the vanadium industry, which the Court below admitted was achieved pursuant to an intent to monopolize and with an intent to eliminate all competitive forces from the vanadium industry, one of the competitors being petitioners. In addition, it was specifically confessed by an executive officer of USV, one of the respondent companies, that it was their specific intention to eliminate these petitioners from the vanadium industry. This same officer testified that the President of VCA told him that

he did not want petitioners in the vanadium industry. Thus, we have here an admitted violation of the antitrust laws, an admitted intent to eliminate petitioners and a 100% monopoly power in respondents to do so. Petitioners were in fact eliminated from the vanadium industry after respondents committed innumerable predatory acts which were specifically and deliberately intended to interfere with petitioners' sources of supply, with petitioners' manufacturing associates and with petitioners' customers. In conjunction with these acts, respondents, who were supplying each other with supplies, jointly refused to deal with petitioners. We have, therefore, two respondents who possessed a monopoly power specifically conspiring to eliminate petitioners as a competitor and the actual in fact elimination of petitioners from the industry.

At the trial, respondents maintained that petitioners' elimination from the vanadium industry was caused by forces other than their conspiracy. However, petitioners contend that under the evidence in this case the question of legal causation is a factual question which must be submitted to the jury and that under *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) an appellate Court cannot take this question away from the jury by reviewing the record and deciding it as a *matter of law.* Causation is a question of fact and when facts relating to causation are in conflict they are to be submitted to the jury in a jury case. *Jacob v. City of New York*, 315 U.S. 752, 756-758 (1942).

Rules relating to intentional torts are applicable in a Sherman Act case such as we have here. This is really

not a "legal cause" action. The "legal cause" doctrine has no place in this case on this record. Two monopolists intended to eliminate petitioners as part of a conspiracy to monopolize. Petitioners were in fact eliminated. They were eliminated after many wrongful and predatory acts had been committed against them, their suppliers, their associates and their customers, in violation of the antitrust laws. Respondents intended to exclude petitioners and they did so. Respondents must be held for the results they intended by their acts in violation of the antitrust laws. Causation is proved when the plaintiff proves impact or contact of such wrongful acts on his business. Restatement Torts, §§ 613-17; §§ 279-280.

This Court has specifically repudiated the use of "legal cause" to prevent the recovery of damages from a wrongdoer in *Story Parchment Co. v. Paterson Paper Co., supra,* and in *Bigelow v. RKO Radio Pictures, Inc.,* 327 US. 251 (1946). The decision by the Court below admits that it refused to follow the *Bigelow* case solely on the ground that *Bigelow* involved general losses inflicted by the defection of countless, individual customers. But this aids petitioners, for *Bigelow* was concerned with the "natural tendency" of acts in restraint of trade on a continuing business. In the instant case, there was direct impact and contact, as well as natural tendency to harm a persistent business venture which tried to succeed in the vanadium industry. It was denied this opportunity by being eliminated pursuant to respondents' conspiracy and their intent to exclude petitioners. The action then is indistinguishable from *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931). In the *Story Parch-*

*ment* case, the issue of legal cause was held to be a factual question to be decided by the jury in a Section 2 conspiracy to exclude action involving facts similar to those involved in the case at bar. The principles set forth in the *Story Parchment* case were erroneously denied to these petitioners.

Moreover, the Appellate Court below, in deciding whether a directed verdict should be granted on the issue of causation as a matter of law, did not view the evidence as a whole, did not allow petitioners the benefit of all their evidence, did not allow petitioners the benefit of all the inferences and presumptions to which the evidence entitled them and did not resolve all the conflict of evidence in favor of petitioners as the rules applicable to judicial review required it to do. This procedure was not only contrary to appellate procedure but is in direct conflict with this Court's opinion in *Beacon Theatre, Inc. v. Westover,* 359 U.S. 500 (1959). In effect, petitioners were denied their right to a jury trial free from prejudicial error. Instead the Court below required petitioners to act to circumvent admitted violations of the antitrust laws by respondents. These standards were not reasonable under the facts of the case and clearly against established judicial enforcement of the antitrust laws. The Sherman Act creates duties on the part of monopolists and does not allow these wrongdoers to expect the law to soften the impact of their wrongs. *United States v. Griffith,* 334 U.S. 100 (1948); *Gamco, Inc. v. Providence Fruit & Product Bldg.* (1 Cir., 1952), 194 F.2d 484; *American Federation of Tobacco Growers v. Neal* (4 Cir., 1950), 183 F.2d 869.

Respondents were engaged in an overall conspiracy to monopolize the vanadium industry. Part of that conspiracy was to eliminate the petitioners from the Canadian market by preventing them from shipping vanadium products to their Canadian customers, particularly Atlas Steel, Ltd., one of the largest Canadian Steel companies. This was accomplished by utilizing Electromet of Canada, a wholly owned and controlled subsidiary of one of the respondents. Electromet of Canada, pursuant to an agency agreement with the Metals Controller, an agent of the Canadian government, completely controlled the importation and allocation of vanadium products into Canada during the war. In furtherance of their conspiracy, respondents used this agency position to prevent petitioners from selling to their Canadian customers and to allow only respondents to ship their products into Canada. It is clear that the unlawful use of the Canadian subsidiary for the purpose of violating the antitrust laws did not immunize respondents from liability. The fact that the Canadian subsidiary had an agency agreement with the Canadian government did not permit the respondents to conspire to use that agency to eliminate petitioners from the Canadian market. The citation by the Court below to *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961) for the proposition that respondents' conduct in this respect did not violate the Sherman Act is patently erroneous. The *Noerr* decision held that the antitrust laws did not apply to joint action to lobby or to influence the passage of legislation, which is not at all involved in the case at bar.

The *Noerr* case does not apply to ordinary commercial activity which discriminates against outsiders. The Sherman Act does not allow immunity or exemption for commercial conduct or activity working on the free flow of interstate and foreign commerce. ***Maryland & Virginia Milk Producers Ass'n. v. United States,*** 362 U.S. 458 (1960); ***United States v. Socony Vacuum Oil Co.,*** 310 U.S. 150 (1940); ***United States v. Sisal Sales Corp.,*** 274 U.S. 268 (1927); ***United States v. Deutsches Kalisyndikat Gesellschaft*** (S.D. N.Y. 1929), 31 F.2d 199.

# VII

## ARGUMENT

## A

### QUESTION 1

**THE DETERMINATION BY AN APPELLATE COURT OF THE QUESTION OF CAUSATION AS A MATTER OF LAW IN AN ACTION BROUGHT UNDER SECTIONS 1 AND 2 OF THE SHERMAN ACT INVOLVING AN ADMITTED CONSPIRACY TO MONOPOLIZE BY RESPONDENTS HOLDING 100% OF THE INDUSTRY, AFTER PROOF OF AN INTENT BY RESPONDENTS TO ELIMINATE PETITIONERS AND THE SHOWING OF PERSISTENT AND BONA FIDE EFFORTS BY PETITIONERS TO ENTER THE INDUSTRY, COUPLED WITH PROOF OF DIRECT AND IMMEDIATE IMPACT AND HARM CONSISTING OF RESPONDENTS' REFUSALS TO DEAL, INTERFERENCES WITH PETITIONERS' SUPPLIES AND MANUFACTURING ASSOCIATES, ORDERS TO LEAVE THE INDUSTRY, THREATS OF REPRISALS AGAINST PETITIONERS' MANUFACTURING ASSOCIATES, AND THE ELIMINATION OF PETITIONERS' EXPORT MARKET BY THE USE OF A SUBSIDIARY IS CONTRARY TO THE DECISIONS OF THIS COURT, THE PURPOSES OF CONGRESS AND THE JUDICIAL APPLICATION OF THE SHERMAN ACT**

**A. The decision below is in basic conflict with the purposes of Congress in establishing liability on those who conspire to monopolize, with the decisions of this Court which have rejected the determination of legal cause as a matter of law in Sherman Act litigation, and with decisions of this Court which allow damages to those who suffer from the natural consequences of wrongful and intended acts**

The Sherman Act is a Congressional determination that intentional acts aimed at the destruction of competitors are actionable by those who are the objects of the restraints. As a matter of judicial enforcement of Congressional purpose, proof of a conspiracy to monopolize and to exclude a competitor creates liability, and causa-

tion is proved upon the showing of impact or contact and the in fact elimination of a persistent competitor.

We respectfully submit that even though the Court below conceded that the antitrust laws had been violated by respondents, its decision requires plaintiffs in a private antitrust action to be subjected to a rigorous factual test that the cause of their injury be proved to a reasonable certainty as a matter of law, a test which is not warranted by judicial construction of Congressional purposes. The concept of "legal cause" as applied by the lower Court has never been applied to an action where there has been direct, immediate contact on a business pursuant to a plan and intent to monopolize and to exclude and the actual in fact exclusion of the business. Petitioners respectfully submit that in such a setting the application of the test of "sufficiency of causation" or "proof of causation to a reasonable certainty" or "legal cause" conflicts with the very nature and meaning of a private antitrust action as intended by Congress and places the judiciary in an antagonistic position to the purposes of Congress. The lower Court decision applies general tort doctrines which were specifically rejected by this Court in *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251 (1946) and which have no application whatsoever to a conspiracy to monopolize case. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

A private litigant under Section 4 of the Clayton Act need only prove a violation of the general prohibitions on unreasonable restraints of trade and that he has thereby suffered injury. *Radovich v. National Football League*, 352 U.S. 445 (1957). The Sherman Act violations

encompassed here involve the commission of *intentional* acts specifically designed to interfere with the free workings of the market place and natural forces of supply and demand. Where the conduct proved is the kind of predatory business aggression which stems from a conspiracy to monopolize, the private party need only prove the contact or the impact of the combination upon his business to pass the test that he "has thereby suffered injury". This is so as a matter of judicial interpretation of Congressional purposes. The act of 1890 was a statutory adoption of common law principles voiding commercial activities held to be in restraint of trade. The business conduct involved was intentional and, as a matter of law, not justified by the rules of competition.

As stated by this Court in *Standard Oil Co. v. United States,* 221 U.S. 1, 58 (1911), the law denounced acts which:

> ". . . give rise to the inference or presumption that they had been entered into or done with the *intent to do wrong* to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy . . ." (Emphasis added) (p. 58).

The Sherman Act allowed recovery for intentional business invasions of the "right of individuals". The private right of recovery under the Sherman Act extended the benefits of the principles of damage law providing a redress where a wrong has been done to business conduct banned by the Act. The effect of the Act of 1890 was to give a cause of action to those who suffered by business

restraints. If a person was harmed in his business by conduct in restraint of trade he was considered directly injured. *United States v. Addyston Pipe & Steel Co.* (6 Cir. 1899), 85 Fed. 271, 279; *Wheeler-Stenzel Co. v. National Window Glass J. Ass'n.* (3 Cir. 1907), 152 Fed. 864, 874; *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.* (1 Cir. 1932), 57 F.2d 96; *Monarch Tobacco Works v. American Tobacco Co.* (Cir. Ct. W.D. Ky. 1908), 165 Fed. 774, 777; *A. C. Becken Co. v. Gemex Corporation* (7 Cir. 1959), 272 F.2d 1.

A Congressionally supported cause of action for intentional restriction of the free market place became established and judicial principles applicable to intentional torts were imposed. It is elementary that, under tort law, plaintiff proves liability when he proves acts intentionally committed to cause harm and the impact or contact of those acts upon him. An intentional act plus contact creates liability. (Restatement Torts, §§ 13-17; §§ 279-280.)

Once liability is established, the wrongdoer is liable for all the natural consequences of his intended acts. Restatement Torts, § 915:

> "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the harm resulted from an outside force, the risk of which was not increased by the defendant's act."

See also 15 Am. Jur., Damages, §§ 65-70.

Under tort law, respondents are viewed as intentional wrongdoers and are liable for the result they intended to bring about by their deliberate violations of Congres-

sionally established rules, the result in this case being admittedly the elimination of petitioners, upon the showing of impact or contact on petitioners' business. We respectfully submit that there is ipso facto presented a factual issue on causation when it is shown that the conspiracy to monopolize was intentionally entered into, had as its goal the exclusion of competitors, involved acts in violation of law which affected and had an impact on competitors and the intended exclusion results. "It is generally agreed that results intended by an actor are proximate if they, in fact, take place." McLaughlin, *Proximate Cause,* 39 Harvard L.R. 149, 151 (1925). See also Terry, *Proximate Consequence in the Law of Torts,* 28 Harvard L.R. 10, 17 (1914); Edgerton, *Legal Cause,* 72 U. of Pa. L.Rev. 211, 343, 358-359 (1924); Smith, *Legal Cause In Actions of Tort,* 25 Harvard L.R. 103, 228-229 (1911).

In the instant case, petitioners showed that it was the intent of respondents' conspiracy to monopolize and to eliminate all competition, specifically including petitioners herein. Mr. Blair Burwell, the chief executive officer of one of the respondents, so testified. In fact, for the purposes of its opinion, the lower Court *admitted* this. Petitioners also showed that they were eliminated from the vanadium business and suffered injury thereby. This also the Court admitted for the purposes of the opinion. Therefore, the result which respondents intended actually occurred.

Petitioners' evidence showed that pursuant to the conspiracy, which was directly aimed at petitioners and other competitors, respondents did the following:

(1) Withheld over 90% of the supply of vanadium oxide from petitioners during the period 1939 to 1946. (Pl. Ex. 132, R. 2258-2265, 1245; Pl. Ex. 65, R. 170-171, 778; Pl. Ex. 128, R. 189-190, 1239; Pl. Ex. 77, R. 176-177, 776; D's. U. Ex. U-4-M, R. 580, 955; D's. U. Ex. U-4-N, R. 581, 957; Pl. Ex. 40, R. 153, 269; Pl. Ex. 41, R. 154, 270; Pl. Ex. 42, R. 155-157, 270.)

(2) Directly interfered with and prevented petitioners' independent avenues of supplies from producing or shipping vanadium oxide to petitioners. (Pl. Ex. 118, R. 2202-2211, 1065; Nisley & Wilson, R. 654-668); (Loma (Morrison, Ackerman), R. 303-306; Blanding, Pl. Ex. 131, R. 2234-2251, 1242; R. 1738-1759; R. 1950; Pl. Ex. 157, R. 2341-2352, 1791; R. 1950; North Continent, R. 483-484; D's. U's Ex. U-2-E, R. 481-482; D's. U's Ex. U-3-R, R. 565-566, 915; D's. U's Ex. U-3-T, R. 918, 566.)

(3) Directly induced petitioners' manufacturing associates to discontinue business relations with petitioners. (Pl. Ex. 62; R. 163-169, 584; R. 1335-1337, 1072; 1947-1949.)

(4) Ordered petitioners to stay out of the vanadium business and threatened commercial reprisals to those who associated with petitioners. (Offer of Proof, R. 823-829.)

(5) Restricted petitioners' exports to Canada so as to deprive petitioners of an important market for their products. (Offer of Proof, R. 826-868.)

It is undeniable that in each of these activities:

(a) Respondents violated the Sherman Act; (b) Respondents intended to injure petitioners, and (c) Respondents' conduct had a direct, immediate and injurious im-

pact on petitioners, who were, as a result of these activities, unable to remain in the vanadium industry on a sound economic basis. (R. 970-972, 883-884, 891.)

In each of these actions respondents violated the will of Congress by using illegal means to cause injury and harm to petitioners. *United States v. Griffith*, 334 U.S. 100 (1948); *Fashion Originators' Guild v. Federal Trade Com'n.*, 312 U.S. 457 (1941); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1949); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

As a matter of Congressional mandate, the conspiracy involved herein and the practices undertaken pursuant to it are deemed injurious to competition. By judicial construction of Congressional purposes, the practices involved herein are pro tanto injurious to the market place, those competing in it and to these petitioners, one of those competitors.

**B. The decision below is in direct conflict with Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), All Landmark Decisions of This Court**

**1. The decision below is in direct conflict with Story Parchment Paper Co., 282 U.S. 555 (1931), which held that the proof of a conspiracy to monopolize contemplating the elimination of the plaintiff in an effort to maintain a monopoly control and the demise of the plaintiff-competitor presented sufficient evidence of causation to sustain a verdict for the plaintiff**

*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), is all controlling here. In that case, this Court held that proof of conspiracy to eliminate a competitor by three companies holding monopoly power in an effort to maintain such monopoly control, and the in fact demise of the competitor presented sufficient evidence of causation to sustain a verdict. This is precisely the factual situation presented in the case at bar.

In *Story Parchment* the majority lower Court opinion reasoned that although there was proof of conspiracy to monopolize by fixing prices in order to eliminate a sole competitor, a fact assumed to be true in the opinion of the Court below in the case at bar, that the jury verdict in the trial Court should be reversed because: (a) loss of profits would be based on surmise and conjecture; and (b) the plaintiff did not have sufficient capital to meet the competition of defendants anyway. Therefore, the majority opinion concluded, the plaintiff had not proved causation. The majority opinion of the lower Court in *Story Parchment* stated in summary:

> "The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage

from the reduced prices at which it was compelled to sell its product by reason of the alleged unlawful conspiracy of the defendants, or that the subsequent depreciation of its plant was due to any violation of Section 2 of the Sherman Anti-Trust Act (15 USCA §2) by the defendants." (37 F. 2d 541.)

In a dissenting opinion, Judge Anderson concluded that the damages suffered by plaintiff were not speculative and that the Court had improperly invaded the province of the jury in determining that the plaintiff would have died anyway. The dissenting opinion's statements are precisely applicable here. The Court stated (p. 542):

"... In a word, we have here, indisputably, a combination to kill a competitor followed by the speedy death of that competitor."

And at pages 543-544 of the dissenting opinion, Judge Anderson stated:

"The statements in the majority opinion that the plaintiff went out of business for lack of sufficient capital, 'and that its failure was inevitable, either from lack of capital or inefficient management or both,' amount to usurping the function of the jury. Indeed, the opinion on damages does not read at all like the opinion of an appellate court, dealing only with questions of law; it deals largely with facts solely for the jury.

"There is no discussion of the soundness of the trial court's instructions on damages. By necessary implication, they are conceded to be correct. The conclusion is (to repeat) that, without the defendants' conspiracy to put the plaintiff out of business, it would have died anyway. The logic is, in that regard, hardly

distinguishable from setting up the mortality of all human beings as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff, and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or its results."

This Court granted certiorari and rejected the majority opinion of the lower Court and adopted Judge Anderson's dissenting opinion. This Court held "That the petitioner was injured in its business and property as a result of this unlawful combination we think also finds sufficient support in the evidence." (282 U.S. 559.)

As to the conclusion of the lower Court in the *Story Parchment* case that the plaintiff could not prove that defendants caused the depreciation of his plant since it lacked sufficient capital anyway, this Court stated:

"Disposing of the second item of damages, the court below after referring to evidence tending to show that petitioner was not in a thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to

> the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' Milwaukee etc. Railway Co. v. Kellogg, 94 U.S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (282 U.S. 566-567.)

The *Story Parchment* factual situation is indistinguishable from the factual situation presented in the case at bar. In the *Story Parchment* case, as in the instant case, petitioner was the sole challenger to the monopolists. In the instant case, two monopolists conspired to maintain domination. In *Story Parchment* three monopolists conspired to maintain domination. In the instant case, the Court below conceded, for the purpose of its opinion, that respondents did in fact conspire to monopolize the industry. So did the Appellate Court in the *Story Parchment* case.

The *Story Parchment* decision by this Court stands for the proposition that appellate courts are in error when they fail to give effect to the intended effects of the conspiracy and the natural tendency which the acts committed pursuant to such illegal purpose have on competition.

We submit it is gross error under the *Story Parchment* case to refuse to allow the jury to determine whether or

not the acts of respondents, who had as their intention and purpose the elimination of all competitors, caused the elimination of petitioners.

Indeed, the legal presumption is that a conspiracy to eliminate competition continues until it succeeds. As stated by this Court in *United States v. Kissel*, 218 U.S. 601 (1910), at 607-608:

> ". . . A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed."

Under the holding of the *Story Parchment* case, the question of causation is a question of fact determinable by the trier of fact when a plaintiff proves a conspiracy to monopolize, a purpose and intention to eliminate him and his actual elimination from the industry after bona fide attempts to remain in the industry. In the case at bar, petitioners proved all these facts and more. In *Story Parchment* the defendants merely reduced prices; here there were affirmative, predatory acts of refusals to deal, of obstruction of sources of supply, of commercial interference with petitioner's manufacturing associates so as to disrupt petitioners' arrangements with these associates and thereby keep petitioners out of the industry, of a deliberate and successful elimination of petitioners from an existing and profitable export business.

See also *Richfield Oil Corporation v. Karseal Corporation* (9 Cir. 1959), 271 F.2d 709, 713; *Fox West Coast Theatres Corp. v. Paradise T. Bldg. Corp.* (9 Cir. 1958), 264 F.2d 602.

**2. The decision below is in direct conflict with Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946), which held that a wrongdoer may not object to a plaintiff's estimate of the cause of injury and its extent because it was not based on more accurate data when the wrongdoer's misconduct has rendered this information unavailable**

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), this Court held that when there is proof of wrongful acts, their tendency to injure plaintiff's business and evidence of a decline in prices, profits or values not shown to be attributable to other causes, the jury alone is authorized to assess damages. In so holding, this Court made it abundantly clear that the wrongdoer could not object to a plaintiff's reasonable estimate of the cause of injury and its extent on the ground that it was not based on more accurate data.

In the *Bigelow* case, this Court held that a jury could conclude as a matter of just and reasonable inference from proof of defendant's wilful acts, their tendency to injure plaintiff's business and from evidence of a decline in prices, profits and values that defendant's wrongful acts had caused damage to plaintiff. This Court pointed out that the wrongdoer was in no position to complain of the award of extensive damages, since his own actions had prevented the fact finders from knowing what would have occurred but for the wrongdoing. We very respectfully submit that the *Bigelow* case was not based on whether or not there existed a loss inflicted by the defection of countless individual customers, as the lower Court claimed in the case at bar, but was a holding that the law asserts liability upon those who engage in activity in violation of Congressional mandates.

The holding in the *Bigelow* case that a jury may award damages based on relevant evidence after proof of lia-

bility was no different in principle than the law applicable to cases involving a marine collision in which the offending vessel has violated regulations prescribed by statute, confusion of goods cases, or trade mark or patent infringement cases where the wrongdoer is held to account for his profits. Once the wrong and harm are established by the doing of intentional acts and contact on the offended party, in all these cases, the *Bigelow* principles of causation and assessment of damages are applied.

Similarly, in this case there can be little question that the question of the cause of damage and its extent should have been a question for the jury under the *Bigelow* case. In *Bigelow* the "contact" was in terms of "natural tendency"; here they were direct and intentional.

The Court below relied on *Momand v. Universal Film Exchanges* (1 Cir. 1948), 172 F.2d 37, which affirmed 72 F.Supp. 469 (1947) and which was decided after this Court's opinion in *Bigelow*. However, the *Momand* case is really not a "causation" case. The *Momand* case involved the inability of a plaintiff, after a prior judgment, to separate damages from specific claims of a variety of restraints. (72 F.Supp. 478, 172 F.2d 37 at 43.) In that case, plaintiff had litigated the issues involved in twenty business practices in a prior suit. Only two were found to be illegal. In a subsequent case, the *Momand* Court held that the plaintiff could not "shotgun" the twenty practices in the subsequent action so as to claim damages from restraints that had already been held to be legal. Here there has been no finding that respondents' activities are in any way legal, and in fact, the lower Court *assumed* that they were *not* and that respondents were engaged in

an overall conspiracy to eliminate competition. Even the *Momand* case conceded that in such a situation "the usual rule of tort" is that a plaintiff may recover for loss to which defendant's wrongful conduct substantially contributed. In other words, even the *Momand* case did not feel that plaintiff had to assume any burden to show that defendant's activity was the sole cause. However, the Court below, in the case at bar, used the *Momand* case as authority that petitioners did not prove a cause of action because they did not prove that no alternative arrangements were possible. It then went a step further and held that the Court *as a matter of law* was to determine whether petitioners had failed to find alternative sources, which, under any theory, is purely a question of fact. Whether petitioners were injured by respondents' violations committed pursuant to a conspiracy to monopolize or by other causes which respondents alleged was strictly a question of fact for the jury.

It is respectfully urged that proof of "cause" is established upon the proof that respondents' unlawful activities had contact and impact on petitioners. If it is respondents' contention that "other factors" caused petitioners' injury, it is a question of fact for the jury to decide whether it was these "other factors" or respondents' antitrust violations that caused petitioners to be excluded.

Even ordinary negligence law does not aid respondents. Justice Cardozo made it clear in *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), that once the plaintiff is found to be in the area of foreseeable harm, any damages which occur to him as a result of defendants' negligence are compensable. The Court stated:

". . . We may assume, without deciding that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences however novel or extraordinary."

However we are not here concerned with a negligence case. In the instant case petitioners were the intended victim of *intentional* acts, of an intentional and a deliberate exclusionary conspiracy which accomplished the very results which the respondents intended and which Mr. Burwell stated was the "only reason" that respondents would not sell oxide to petitioners. (R. 547.)

Furthermore, even under the law of negligence, the question of causation is a question of fact for the trier of fact to determine.

As stated in Harper and James, *The Law of Torts*, Vol. 2, pp. 1118-1119:

"A distinction should be emphasized at this point. We are concerned here with the *sufficiency, not the weight* of the evidence, and on familiar principles plaintiff is entitled to have sufficiency tested on the basis of the evidence most favorable to him. It is only to that version of the evidence therefore that the equal probability test (of the legitimacy of an inference) may properly be applied. It is the jury's function, not the court's, to say whether plaintiff's version of the case is sustained by the greater weight of the evidence. A case therefore in which the evidence most favorable to plaintiff (including the opinion of qualified experts) affords the basis for an inference of cause is not defeated as a matter of law by defendant's evidence of a different version of facts or a different theory of cause in fact. Where the evidence stands in that posture, the question of what

> probably happened in the case is for the jury even though the court might be inclined to accept the defendant's version."

See also Restatement Torts §§ 430-434.

We respectfully submit that this Court's opinion in the *Bigelow* case has decided, similarly, that antitrust actions are to go to the jury on causal issues when a conflict is presented and that damages are to be awarded where a wrong has been done.

"Legal Cause" is a legal doctrine which lends itself to the most extreme form of judicial speculation so as to deprive a litigant of his right to have all factual issues determined by the trier of fact. The learned Court below cited Comment, 61 Yale L. J. 1010. But this Comment pointed out at 1019:

> "Since 'legal injury' criteria are court applied, they provide convenient means to circumvent the *Bigelow* rule requiring submission of the causal issues to the jury whenever there is a reasonable inference that the violation caused injury."

There is really no judicial problem of "cause" here. Respondents violated the antitrust laws. They intended to harm and exclude petitioners. Respondents' officers testified they intended to harm petitioners. Petitioners were in fact subjected to various forms of impact and harm and were excluded from the vanadium business. The decline of profits and values, resulting in the complete exclusion of petitioners from the vanadium industry, under the accepted damage principles as spelled out by this Court in the *Bigelow* case, entitles them to damages.

## B

### QUESTION 2

**PETITIONERS, AGAINST WHOM A DIRECTED VERDICT WAS ORDERED BY THE APPELLATE COURT AS A MATTER OF LAW, WERE DEPRIVED OF A JURY TRIAL BY THE APPELLATE COURT BELOW WHICH, IN DIRECTING A VERDICT, WEIGHED THE EVIDENCE, MADE FACTUAL RULINGS ON THE SUFFICIENCY OF THE EVIDENCE OF CAUSATION, DID NOT VIEW THE EVIDENCE AS A WHOLE, DID NOT ALLOW PETITIONERS THE BENEFIT OF THEIR EVIDENCE, DID NOT ALLOW PETITIONERS THE BENEFIT OF ALL INFERENCES AND PRESUMPTIONS THAT COULD BE DRAWN FROM THE EVIDENCE AND DID NOT RESOLVE ALL CONFLICTS IN THE EVIDENCE IN FAVOR OF PETITIONERS, ALL IN DIRECT CONFLICT WITH RULES GOVERNING JUDICIAL REVIEW AND THE DECISIONS OF THIS COURT**

**A. Petitioners were entitled to a just and reasonable interpretation of the record**

Not only does *Story Parchment Co. v. Paterson Parchment Paper Co., supra,* hold that causation in a Section 2 case of the type involved here and under the facts present in this case is a question of fact for the jury, but it also establishes without any doubt that the Court below made factual evaluations reserved only for the jury. Under *Story Parchment* the conclusion is inevitable that in the case at bar there was a conflict in the evidence on the issue of causation and that the petitioners were entitled to have this issue determined by the jury. The Court below actually weighed the evidence and made factual determinations on conflicts in the evidence. And in reaching these conclusions, it failed to resolve the factual conflicts in favor of petitioners, as it was required to do. This it did on a cold record. The trial Court which heard the evidence first hand from the witnesses' lips was of

the opinion sufficient evidence was present to submit the case to the jury and the case was submitted to the jury. There was such a grave departure from the rules of judicial or appellate review by the Court below in directing a verdict that petitioners were deprived of their constitutional right to a trial by jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Ellis v. Union Pac. R. Co.*, 329 U.S. 649 (1947); *Stone v. New York C. & St. L. R. Co.*, 344 U.S. 407 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

**B. Only the trier of fact, the jury in this case, can draw inferences, determine the weight of the evidence, resolve conflicts in the evidence, determine the credibility of the witnesses. The Court below erred in not applying these traditional rules and in making these determinations itself as a matter of law**

Respondents were entitled to a directed verdict only if on the evidence and the presumptions and the inferences that could reasonably be drawn from these facts, *considered in the light most favorable to petitioners*, reasonable men could not possibly have come to a contrary conclusion. Moore's Federal Practice, 2nd Ed., Rule 50, p. 2314, citing *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U.S. 727 (1887); *Delaware, L. & W. R. Co. v. Converse*, 139 U.S. 469 (1891); *Gunning v. Cooley*, 281 U.S. 90 (1930).

In *Gunning v. Cooley, supra*, at page 94, this Court stated:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

Appellate Courts are not to search the record to take cases away from the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

The limitations on the judiciary in granting directed verdicts or nonsuits preserves the Constitutional right to trial by jury. *Jacob v. City of New York*, 315 U.S. 752 (1942); *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

In the case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943), Mr. Justice Murphy stated the present rule of this Court as follows:

> "It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury; it is the jury, not the

> Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions, that which it considers most reasonable [citing cases] . . ."

The very essence of the jury is to select from conflicting inferences and conclusions that which it considers most reasonable. This right, whether it relates to negligence, causation or any other factual issue cannot be ignored. *Tennant v. Peoria & P. U. Ry. Co., supra*, at 321 U.S. 35; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

And in reaching these conclusions, the trier of fact looks at the evidence as a whole. As stated by the Sixth Circuit Court in *American Tobacco Co. v. United States* (6 Cir. 1944), 147 F.2d 93 at page 106:

> "At the outset, it may be remarked that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544, 33 S.Ct. 141, 57 L. Ed. 333; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it. *United States v. Pullman Co.*, D.C., 50 F.Supp. 123".

In *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407 (1953), this Court stated:

> "The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury."

**C. The Court below failed to give judicial meaning and content to the violations of law committed by respondents and the natural tendency of these acts to injure. Instead the Court drew inferences against the petitioners so as to exact legal duties from them which are unwarranted in the law**

The complaint filed herein and the trial made it abundantly clear that petitioners were complaining of a Section 2 conspiracy to monopolize case. Petitioners were not relying on a simple refusal to deal Section 1 case. They proved, *inter alia*, a combination to acquire control of vanadium oxide and ferrovanadium, to exclude competitors, to fix prices, to interfere with petitioners' suppliers and manufacturing associates, to use monopoly power to threaten reprisals against those competing with respondents, to cause exclusion of petitioners' exports to the Canadian market and to boycott petitioners.

In spite of this, the Court below ruled that it was incumbent on the petitioners to show that they requested vanadium oxide when they lost their manufacturing associates and that, when they did request supplies from respondents and were jointly refused, that they *sought* and exhausted every conceivable alternative source of supply.

But these requirements have no place in this action and they can only be imposed by the judiciary's failure to give full meaning to violations of the antitrust laws. Compare *W. W. Montague & Co. v. Lowry*, 193 U.S. 38, 47 (1904); *American Federation of Tobacco Growers v. Neal* (4th Cir. 1950), 183 F.2d 869; *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1 Cir. 1952), 194 F.2d 484.

Under the evidence in this case, petitioners were not required to make demands for vanadium oxide from

respondents, but could establish liability just by showing the deliberate destruction of their existing vanadium oxide suppliers, Loma Mill, Blanding Mines, Gateway or Nisley & Wilson, and North Continent Mines. Pursuant to respondents' conspiracy, as outlined in petitioners' statement of facts in this brief, bold and successful predatory means were taken by respondents to interfere with each of these suppliers so as to deprive petitioners of a steady and dependable source of oxide.

And even assuming this was not sufficient, petitioners could have rested on respondents' direct interference with petitioners in their dealings with Apex, Climax and Imperial.

In each instance the record herein showed shattering injurious impact. Apex was not obtaining sufficient quantities of oxide to run its mill at half capacity. (D's. V's. Ex. V-1-A; R. 2512A, 1142.) And just before termination of its relationship with petitioners, Apex was unable to obtain oxide supplies after repeated requests. (Pl. Ex. 144; R. 2266, 1313; Pl. Ex. 146; 2271-2275, R. 1320.) Apex capitulated just shortly after Blanding Mines informed it that Blanding could no longer furnish it with a supply of oxide which was necessary for production of vanadium for petitioners. (Pl. Ex. 131; R. 2239, 1242.) Respondents' exclusionary conspiracy left petitioners in June, 1942, without Apex Smelting and facing hostile monopoly powers. By June, 1942, only North Continent remained as a limited source of supply, a source which was hardly able to support the kind of manufacturing engaged in by respondents or attractive to others.

Further, it is elementary that the law does not demand a useless act and, accordingly, it certainly cannot establish a request to deal as a condition precedent to liability when the evidence shows conclusively that respondents consistently refused to supply petitioners, that such requests would have been futile and that a reasonable and prudent man would have known that it was useless to have sought the request from respondents after a series of *prior refusals*. "The law neither does nor requires idle acts."

But even assuming that requests for supplies were necessary, a just and reasonable interpretation of the record giving to the evidence all the necessary intendments, inferences and presumptions to which petitioners are entitled shows that requests were made at critical times in petitioners' relationships with their manufacturing associates when obtaining such supplies was urgent. (See R. 955-956; 1018; 1012-1013; 1302-1305.)

The Court below found that at the times petitioners claimed they were unable to obtain vanadium supplies from respondents, there was evidence that other sources were available to them. The Court was particularly concerned with the failure to buy certain Nisley & Wilson vanadium oxide in June of 1943, October, 1943 and January, 1944. However, the evidence proved that during 1943 Nisley & Wilson were under the control of USV, as agent for MRC. This agency relationship was used by respondents to channel Nisley & Wilson and their production into the hands of USV completely contrary to Mr. Nisley's desire. (R. 660.) In fact, this made it neces-

sary for petitioners to deal not with Nisley & Wilson, but with USV or MRC.

The supplies referred to in January, 1944, did not relate to oxide at all, but were raw ore. Mr. Nisley envisioned a plan for the conversion of the ore owned by MRC into oxide by Nisley & Wilson. However, Nisley & Wilson would have had to obtain the ore from MRC first, and USV was the agent for MRC.

Furthermore, the lower Court's demand that petitioners do business with Nisley & Wilson, in 1943 and 1944, in view of the evidence that the petitioners had done business with them in 1942, but that this business was deliberately thwarted by respondents is uncomprehensible and clearly places antitrust responsibility on the wrong foot. The respondents closed Nisley & Wilson in October, 1942, following the diversion of their ore supplies. (R. 658.) It was for the jury to determine what would have occurred but for the thwarting of the Nisley & Wilson Mill in 1942 and what impact this had on petitioners. The Court below has completely reversed the natural effect of violations of the antitrust laws into a condition precedent barring recovery from the wrongdoer. Petitioners were only required to show that a free and competitive market was converted into a monopoly market and that their substantial suppliers were thwarted or denied, *at opportune times*, so as to deny them steady, dependable sources of supply. (*Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).)

It is one thing to demand that petitioners utilize oxide supplies from Nisley & Wilson in 1941 at a time when they were operating with Apex Smelting under an agree-

ment and could have used the oxide, but it is quite another thing to demand that petitioners make demands of Nisley & Wilson in 1943 after VCA had interfered with Apex so as to cause petitioners' manufacturing associate Apex to leave the vanadium business and cease to associate with petitioners. It is one thing for the Court to ask that petitioners succeed with a firm as important as Imperial Paper and Color in 1940 when conditions looked favorable and markets were available to petitioners. But it is quite another thing to ask that petitioners succeed with Imperial on the same basis in 1944, 1945, and 1946 when the respondents had deliberately destroyed the market, had deliberately destroyed all the independent vanadium oxide mills, had deliberately acquired the existing government plant "to keep control of the production of vanadium" (R. 246-247) and had made it clear that such acquisitions were notice to all of continuing monopolization. A conspirator cannot, under the antitrust laws, drive a competitor out of business, and after he has driven him out of business offer him lagniappe by making available to him supplies which are by this time useless to him as a result of the conspirator's wrongdoings. The failure of the Imperial venture proved the complete success of years of monopolization. The domestic sources of oxide supply denied to Imperial were denied by acts of the respondents, not by acts of the petitioners.

Not only did the Court below fail to give the petitioners the presumptions and inferences which were their due under the Sherman Act and rules of judicial review, but the Court below established rules which find no place in the judicial enforcement of antitrust liability.

**D. Even assuming the correctness of the legal conclusions of the Court below, the opinion of the Court below conflicts with a just and reasonable interpretation of the record, for the evidence shows that by giving petitioners the benefit of all the inferences and presumptions to which the evidence entitled them and by resolving the factual conflicts in their favor, as required by the rules of judicial review, petitioners proved the very matters which the lower Court stated were not proved and upon which, so the lower Court stated, it was required to hold that there was no causal relationship as a matter of law between respondents' antitrust violations and petitioners' injury**

But even assuming that the Court below was correct in establishing that, as a condition precedent to petitioners' recovery, they were required to make a constant demand for vanadium oxide and to exhaust every conceivable alternative source of supply, however chronologically remote those offers and sources were to the acts of impact and harm, petitioners in fact proved that they did make requests for oxide from respondents throughout the conspiracy's continuation and that they reasonably offered to do business with alternate sources. Petitioners further proved that respondents' refusals to deal occurred at strategic times when petitioners were attempting association with manufacturing concerns, needed the supplies to remain in the vanadium industry and that respondents' refusals to deal were the substantial factor in petitioners' failure to achieve successful entry into the vanadium business.

At the very least, under the applicable rules of judicial review, a factual conflict was presented on the issue of causation which was for the jury to determine.

**1. Apex**

As to the Apex contract, the Court below stated in its opinion:

> "We hold, under the cases cited pages 8-9, *supra*, that the failure of Apex or of Continental to try to buy oxide from the defendants during the final and most critical period in the life of the Apex contract made it impossible for the jury to find that defendants' refusals to deal caused Apex to terminate the arrangement with Brignoud. In regard to the Apex venture, the judgment below is affirmed." (R. 2576.)

In its opinion, the Court below stated that petitioners failed to make requests for supplies for a year prior to the time that lack of supplies caused Apex to end its relationship with petitioners and that this failure to make requests for supplies during the "final and most critical period of the Apex contract" made it impossible for the jury to find that respondents' refusal to deal caused Apex to terminate its business arrangement with petitioners.

But to the contrary, the evidence showed that Apex or petitioners did try to obtain supplies and that they tried to obtain them during the period of time that the Court below took it upon itself to establish as the "critical" period.

On or about January 27, 1942, petitioners were notified by Apex that it was discontinuing its relationship with them. (Df. V's Ex. 1-Y, R. 2519, 1173.) Production continued until June, 1942, by special agreement between petitioners and Apex because Apex was advised that petitioners had a binding agreement with Apex and petitioners were objecting strenuously to this breach of con-

tract by Apex. (Pl. Ex. 62, 168, 671; 675, 1334, 1945.) To stay in the vanadium business as long as they could by any means, petitioners got Apex to agree that Apex would at least for several months convert all the quantities of vanadic acid petitioners could obtain for Apex from Blanding, Nisley & Wilson and Shattuck. (Pl. Ex. 122, R. 2215, 1096.) Thus, the "critical" year would be from January, 1941, to January 27, 1942. It is uncontradicted that during this "critical" period, petitioners took various actions to obtain the supplies needed by them to allow them and Apex to remain in the vanadium business. See Table appearing at page 59 of this Brief for the numerous requests made by petitioners.

On July 7, 1941, petitioners requested that the Office of Production Management intervene in their behalf to secure supplies of oxide for them. (Pl. Ex. 132, R. 2265, 1245.) Union Carbide and VCA *both* declined to supply petitioners. (Pl. Ex. 132, R. 2265, 1245.)

Thus, petitioners first had asked for the oxide itself (Pl. Ex. 77, R. 176, 761), then that they at least be allowed to process the oxide for respondents (Pl. Ex. 77, R. 176, 761), and finally that the government intervene to acquire supplies for them, so serious did they consider the supply situation to be and so intent were they on remaining in the vanadium business. Yet, in every instance, petitioners were refused supplies.

From October to December, 1941, petitioners frantically attempted to obtain oxide. Having been turned down by respondents, petitioners centered their attention on obtaining acid from the Defense Plant Corporation Monticello Plant, which was under the administration of VCA. (Pl.

Ex. 144, R. 2266-2270, 1313; Pl. Ex. 146, R. 2270-2275, 1320.) On December 3, 1941, Apex requested the Defense Plant Corporation to sell them vanadium oxide from the Monticello Plant which was to be erected. (Id., R. 2266.) This request was suggested to Apex by Mr. Leir after petitioners learned that VCA was to construct the plant. (R. 2267.) Again on December 26, 1941, Apex wrote the Vanadium Division, Office of Production Management, seeking a source of oxide supply. (Pl. Ex. 146, R. 2270-2275, 1320.) These requests were made by Apex at the urging and insistence of Mr. Leir. (Pl. Ex. 146, R. 2270-2275, 1320.)

That Mr. Leir felt it was the better exercise of business judgment to attempt to get government aid in obtaining supplies which were denied him directly by respondents is obvious. He wrote:

> " . . . as far as we can see, the production of Ferro Vanadium has been mainly localized to two very big outfits in this country, and we think we are not asking too much if we apply to you for a better distribution of the available Vanadium Oxide, all the more as the Government is spending a lot of money for new production facilities and road construction out West." (Pl. Ex. 146, R. 2270-2275, 1320, at R. 2275.)

Thus, the evidence showed a request for supplies in June 14, 1941 (Pl. Ex. 77, R. 176, 761) and the desperate offer to mill ferrovanadium from oxide supplied by respondents. (Pl. Ex. 77, R. 176-177, 761; Pl. Ex. 132, R. 2261-2263, 1245.) The evidence showed that petitioners even requested the OPM to intervene for them and attempt to obtain vanadium supplies from respondents. (Pl. Ex. 132, R. 2265, 1245.)

It is also material to note that Apex demanded vanadium oxide supplies from the government and that just *one month* before Apex notified petitioners that they could no longer continue in the vanadium business Apex complained to the government of inadequate supplies. (Pl. Ex. 144, R. 2266-2270, 1313; Pl. Ex. 146, R. 2270-2275, 1320.) And, as previously noted in this Brief, on September 17, 1941, just *three months* before Apex notified petitioners that they could no longer stay in the vanadium business, Apex had complained to petitioners that they were not getting a sufficient quantity of oxide to run their production on half time. (Df. V's Ex. V-1-Q, R. 2512A, 1145.)

Also, in its opinion, the Court below stated that petitioners had obtained 16,000 pounds of vanadium oxide from Electromet Sales in July and August, 1939. (R. 2575.) However, the evidence did not show this at all. To the contrary, the evidence showed that petitioners could not get this oxide directly from respondents, but that they had to purchase it surreptitiously through an intermediary, a Mr. Poliakoff. (R. 1228, Df. U's Ex. U-5-L, R. 558-590, 1229.) Mr. Leir testified that Mr. Poliakoff "got the material which I could not get directly." (R. 1228.)

So, contrary to what the opinion of the lower Court stated the facts to be, the evidence showed a steady and determined joint refusal by respondents to sell to petitioners and to prevent petitioners from getting supplies from any source.

By February 16, 1942, petitioners had received assurances of governmental cooperation in obtaining additional

supplies of vanadic acid. (Df. V's Ex. 2-A, R. 603, 1176.) However, four days after this letter was written, VCA held the meeting with Apex which finally resulted in direct commercial arrangements between Apex and VCA for the purchase of aluminum ingots by VCA, which, in the circumstances and the evidence of this case, certainly permitted the inference to be drawn that the consideration for these arrangements was the discontinuation of the contract petitioners had with Apex. (Pl. Ex. 62, 168, 671; R. 672-676, 1335-1336, 1947-1949, 2144-2146.)

Therefore, the record shows numerous requests by petitioners to buy from respondents during the "critical" period before the notice of cancellation was sent by Apex to petitioners, deliberate refusals to deal with petitioners by respondents and bona fide attempts by petitioners to obtain oxide from other sources.

**2. Climax**

As to the *Climax* arrangement and petitioners' inability to manufacture ferrovanadium in 1943, the Court below stated:

> "Thus even if Continental and Climax were threatened with reprisals, the evidence does not reveal the result of such threats. On the basis of the evidence in the case, the threat of reprisal appears to be one directed against a corporation with which Continental had no business, since the nature and existence of the alleged "pending negotiations" are not shown by the record. Appellants have thus failed to show any injury resulting from the alleged threats. There must be an injury, together with a wrong and a causal connection between the two, before liability can result." (R. 2581.)

But such a conclusion can be drawn only by ignoring completely the direct testimony of Mr. Wolf, petitioners' Vice-President. Mr. Wolf specifically testified that petitioners lost Climax as an associate because of respondents' interference with Climax. (R. 978.) He also testified that respondents prevented the *continuance* of petitioners' existing relationship with Climax by their interference and threats of reprisals. He stated:

> "We had at that time lost as partners in this field Apex Smelting, who had previously manufactured ferrovanadium in conjunction with us as our partners. We had likewise lost Climax Corporation, who had done the same thing to us, and did not *continue* because of interference by the defendants with Climax." (R. 978, emphasis added.)

Mr. Wolf's testimony was substantiated by other evidence. For example, on May 21, 1943, petitioners requested that Electromet fill Continental's oxide requirements for *the remainder of the year.* (Df. V's Ex. U-4-M, R. 580-581, 955; R. 1018.) On that date, Mr. Wolf wrote to Electromet Sales:

> ". . . We are perfectly willing to sign a contract with you for our requirements until the end of the year. At present these requirements are estimated to amount to about 10,000 lbs. of V contained in pentoxide *per month.*" (Emphasis added.) (Df's Ex. U-4-M, R. 580, 955.)

Mr. Wolf testified that this request, made in the latter part of May, 1943, was specifically for a *continued* arrangement with Climax. He testified:

> "Q. Do you recall for which of these contracts you made that demand for the requirement contract?

A. Which of these——

Q. For which of either the Imperial or the Climax contract?

A. That was in June? No.

Q. June of '43?

A. *June of '43? That would have been probably for Climax, I would say.*

Q. Now then, you never did get the requirement contract?

A. No.

Q. In 1943, did you?

A. No." (R. 1018, emphasis added.)

Respondents rejected this request and denied petitioners any supply.

In other words, petitioners were requesting oxide for their Climax contract as late as June, 1943. But petitioners were unable to arrange for the manufacture of ferrovanadium with Climax or any other concern in 1943, 1944, 1945 and thereafter. As to Climax, it is undeniable that the offer of proof by petitioners was that Union Carbide told petitioners to stay away from Climax and that respondents threatened Climax with reprisals in order to disrupt petitioners' association with them and thereby prevent petitioners from remaining in the vanadium business. (R. 827-830.) Petitioners specifically testified that they lost Climax because of the interference by respondents with Climax. (R. 978.) Mr. Wolf testified that the request for oxide from Union Carbide in May, 1943, was to supply Climax with vanadium oxide. (Df. U's Ex. U-4-M, R. 580-581, 955; R. 1018.)

Thus, the lower Court's statement that the "earlier transaction stands alone in the record as the only con-

nection between Climax and Continental" is in error, as is its conclusion that the threat of reprisal was made to a corporation with which Continental had no business.

It is anomalous for the lower Court to say that petitioners had no "pending arrangements" with Climax when the "pending arrangements" were specifically disrupted by respondents' interference pursuant to their conspiracy to monopolize the industry and to discourage any competitor or any associate who entered any arrangement with the competitor

**3. Imperial**

As to the *Imperial* relationship and its failure the Court below stated:

> "Yet from the end of 1943 until 1946, when Electro Metallurgical Sales Corporation gave Continental a requirements contract for vanadium oxide, appellants made no move to obtain the allegedly necessary steady and uniform source of supply from any of the defendants. This is much like the Apex situation except that here there were no offers to buy during the entire life of Continental's arrangement with Imperial. Surely Continental cannot complain that the defendants did it wrong when it cannot show that it sought to alleviate its situation by seeking supplies from the defendants at any time during the life of the Imperial venture." (R. 2582-2587.)

But the evidence was to the contrary. The requests for supplies made by petitioners in November, 1943, only a month and a half before the signing of the Imperial contract, were for the *specific purpose* of supplying Imperial with vanadic acid for its manufacturing arrangement with

petitioners and for the proposed manufacture of ferrovanadium by Imperial. (R. 1012-1013.) At that time, petitioners "were trying to get a basis of raw materials for our negotiations for the forthcoming [Imperial] contract." (Id.) However, respondents uniformly refused to deal. (Pl. Ex. 40, R. 153, 269; Pl. Ex. 41, R. 154, 269; Pl. Ex. 42, R. 155-157, 270.)

**4. Van-Ex Period and Nisley & Wilson**

As to the Van-Ex situation and the alleged refusal of petitioners to acquire the Nisley & Wilson production, the Court stated:

> "We think this failure to deal with Nisley & Wilson during the Van-Ex period precludes Continental from arguing that defendants prevented the acquisition of raw materials at that time. As to Apex, appellants failed to show their inability to get oxide from defendants. With regard to Van-Ex they failed to show that it was impossible for them to obtain supplies from an independent producer." (R. 2579.)

But the evidence showed that Continental could not deal with Nisley & Wilson during this time. The evidence showed that respondents' conspiracy to monopolize shut down the Nisley & Wilson mill from October, 1942, to April, 1943. (R. 662-663.) Mr. Nisley himself testified that respondents caused him to cancel his relations with petitioners. (R. 658.) And when the mill was reopened in April, 1943, Nisley & Wilson were under the control of USV as agent for MRC. (Pl. Ex. 74, R. 2162-2168, 677.)

In March, 1943, MRC had turned down petitioners' request for oxide. (Df. U's Ex. U-4-C, R. 567, 940 and see R. 939.) In June, 1943 the petitioners on one occa-

sion turned down an MRC offer to supply petitioners with Nisley & Wilson production. (Df. Ex. U-3-Y, R. 928-929.) Mr. Wolf testified that he did not recall ever being offered the Nisley & Wilson production by MRC. (R. 926-927.) The oxide was refused in June, 1943 because petitioners were unable to use oxide that was not flaked. (R. 933.)

In October, 1943, Nisley & Wilson could not possibly have been offering vanadium oxide to petitioners because their production was completely under the control of USV, agent for MRC. (Df. U's Ex. U-5-J, R. 2471, 1208.) Nisley & Wilson and petitioners were merely exchanging ideas for future production plans when USV would not be controlling their production.

The opinion of the Court below is also in error in stating that Nisley & Wilson had on hand a stockpile of approximately 300,000 pounds of oxide which they tried to sell to petitioners in the Spring of 1944 and which petitioners refused to buy.

The evidence showed that Nisley & Wilson had closed their mill in January, 1944, as a direct result of respondents' activities. (R. 667-668.) Therefore, Mr. Nisley was not offering petitioners the production of his mill, which was not then even in operation. Mr. Nisley was merely suggesting that he process a stockpile of raw ore located at Gateway which did not belong to Nisley & Wilson but to MRC. (R. 732-734.) Nisley & Wilson's actual ability to obtain the stockpile was conjectural. However, in spite of this, the evidence showed that Mr. Leir stated that he would "give [Nisley] all possible cooperation". (Df. Ex. U-2-W, R. 733, 733.) The evidence was that Mr. Nisley was forced to terminate his production although he knew

that petitioners would buy all the material he could produce. (R. 667.)[30]

**5. Petitioners' Canadian Business**

As to the exclusion of petitioners from the Canadian market, the Court below had to concede that the evidence offered under petitioners' offer of proof was sufficient to sustain a finding that petitioners were damaged as a result of respondents' conspiracy. There was no question as to the causal relationship in this regard. However, the Court below side-stepped this injury to petitioners by holding that respondents' conduct with reference to the Canadian situation did not violate the antitrust laws under the authority of *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961), which we submit is not controlling. We shall discuss this question in the next Section of our Brief.

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[30]As has been indicated previously, Mr. Nisley filed an action in the United States District Court for District of Utah, Central Division, alleging that he and his mill were eliminated from the vanadium business as the result of the conspiracy to monopolize which is the subject of this action. A jury returned a verdict in his favor and found that respondents had conspired to eliminate him. The judgment entered on this verdict was recently affirmed by the Tenth Circuit in *Union Carbide and Carbon Corp. v. Nisley* (10th Cir. 1961) 1962 Trade Cases, Par. 70,222, page 75,805.

C

## QUESTION 3

**THE ANTITRUST LAWS PROTECT A BUSINESS INJURED BY UNITED STATES CORPORATIONS EVEN THOUGH PART OF THE MEANS USED TO ACCOMPLISH THE INJURY INVOLVES THE USE OF A PRIVATE WHOLLY OWNED FOREIGN SUBSIDIARY WHICH WAS GIVEN A DISCRETIONARY POWER BY AN AGENCY OF A FOREIGN GOVERNMENT WHEN THE MATTERS RELATE TO ORDINARY COMMERCIAL ACTIVITY**

**A. United States corporations are liable for conspiring to eliminate the foreign trade of a domestic competitor regardless of the means used. The fact that they use a governmental agency to accomplish this result does not immunize them**

**1. The elimination of petitioners' Canadian business was part of respondents' conspiracy to eliminate Petitioners from the vanadium industry**

At the outset, it must be pointed out that this is not an action against the Canadian government and is not an action against the Office of Metals Controller of Canada. (R. 804; Pl. Ex. 93 for Id.; R. 451, 821.) It is simply an action against Union Carbide (and its American affiliate Electromet) and VCA, all American companies, for conspiring to violate the antitrust laws in furtherance of their own private gain. Part of respondents' conspiracy was effectuated by unlawfully using the wholly owned Canadian subsidiary of Union Carbide, which had been given the power in Canada to allocate and control the importation of vanadium into Canada, to eliminate petitioners from the Canadian market by refusing to allow them to make shipments to their Canadian customers.

It is petitioners' position that:

(1) Respondents were not immune from antitrust violations. They can point to no evidence giving either of them immunity from the antitrust laws.

(2) The fact that Electromet of Canada may have had an agency contract with the Office of Metals Controller to purchase and allocate vanadium certainly does not immunize its parent, Union Carbide, from conspiring with VCA to unlawfully use the agency to further their unlawful conspiracy.

(3) Even assuming that Union Carbide's activities while acting through its Canadian subsidiary were both immune and lawful, which they were not, Union Carbide conspired with the other respondent VCA to use the Canadian subsidiary to further their unlawful conspiracy at the expense of petitioners and the immunity, if any existed, certainly did not extend to these acts and to VCA.

Respondents, of course, cannot point to any evidence giving Union Carbide or VCA immunity from the antitrust laws for any of their acts. There is no evidence of a certificate of immunity from the government nor any evidence that one was ever sought. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Association of American Railroads* (1 D.C. Neb. 1954), 4 F.R.D. 510. The exclusion of petitioners from the Canadian market was part of an overall plan by respondents to conspire to monopolize the vanadium industry. Electromet of Canada, the wholly owned Canadian subsidiary of Union Carbide, was appointed by the Office of Metals Controller, an agency of the Canadian government, to act as its agent in purchasing vanadium for Canadian steel makers. Electromet of Canada was given authority to use its discretion in making purchases and was never authorized by the Canadian government,

or any of its agencies, to conspire with any other company to eliminate competition. It simply was to purchase and allocate. However, respondents, both American corporations, were engaged in a conspiracy to monopolize the vanadium industry, a part of which conspiracy was to eliminate petitioners. In furtherance of that basic conspiracy Electromet of Canada, wholly owned and completely dominated and controlled by Union Carbide, was ordered by its parent to allow into Canada only shipments of oxide from Union Carbide and VCA and to prevent and eliminate petitioners from selling their products to their Canadian customers, including Atlas Steel, Ltd. The power given to the Canadian subsidiary was used by respondents to further the basic conspiracy. Neither the Canadian government, nor its agency the Office of Metals Controller, is charged with any illegality in this case, and both were totally oblivious to the purpose for which the Canadian subsidiary refused to allocate to petitioners or their customers. (R. 831.) The elimination and the predatory tactics dictating the policy of the Canadian subsidiary which brought about the elimination of petitioners took place in the United States and was an arm of the American conspiracy.

**2. Immunity from the antitrust laws will not be implied and even if granted it will be specifically limited to the exact conduct described**

It has been long established that immunity from the antitrust laws will not be created by implication, but rather that there must be a specific grant of immunity. *United States v. Borden Co.* (1939), 308 U.S. 188; *Maryland & Virginia Milk Pro. Ass'n. v. United States* (1969), 362 U.S. 458; *United States v. Radio Corporation of*

*America* (1960), 358 U.S. 334. "We cannot believe that Congress intended to create so great a breach in historic remedies and sanctions." (*Ibid.*, 308 U.S. 188, 198.)

As stated in *United States v. Borden Co., supra*, "If Congress had desired to grant any further immunity, Congress doubtless would have said so." (p. 201.) And again in *United States v. Socony-Vacuum Oil Co.* (1940), 310 U.S. 150, "For Congress had specified the precise manner and method of securing immunity. None other would suffice." (310 U.S. 226-227.) Whenever Congress has desired to grant immunity, it has specifically stated so and has provided the machinery to invoke such immunity.[31]

Furthermore, when Congress has granted immunity, it has specifically limited the immunity to the *exact* conduct described and the Courts have so construed the grants of immunity. In *Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transport. Ass'n.* (D.C. Cir. 1958), 253 F.2d 877, *cert. denied*, (1960) 80 S.Ct. 372, the Court held that even though the alleged conspirational agreements were within

[31]For example, see the following: Agricultural Adjustment Act of 1933, Sec. 8(2); 48 Stat. 34; as amended see 7 U.S.C. Sec. 608b; Agricultural Adjustment Act Amendment of 1935, Sec. 37; 49 Stat. 781; Capper-Volstead Act, Sec. 2; 42 Stat. 388; 7 U.S.C. Sec. 291; The Interstate Commerce Act, Sec. 5a; 62 Stat. 472; 49 U.S.C. Sec. 5b; Federal Aviation Act of 1958, Sec. 414; 72 Stat. 770; Communications Act of 1934, Section 313; 48 Stat. 1087; Webb Export Trade Associations Act, Section 2; 40 Stat. 517; Atomic Energy Act of 1954, Sec. 105; 68 Stat. 938, 42 U.S.C. Sec. 2135 (the Act of 1954 amends and supersedes that of 1946 which contained substantially similar provisions. Both Acts *specifically* provide for antitrust liability); Small Business Mobilization Act of June 11, 1942, Sec. 121; 56 Stat. 357; Small Business Act of 1958, Sec. 11; 72 Stat. 394; Defense Production Act of 1950, as amended, Sec. 708(b); 69 Stat. 581, 50 U.S.C. App. Sec. 2158.

the specific antitrust immunity section of the Interstate Commerce Act and although a certificate of immunity may have been obtained, these agreements nevertheless would be held to be violations of the antitrust laws if they were part of a plan or conspiracy to eliminate competition. Similarly, in *Maryland & Virginia Milk Pro. Ass'n. v. United States, supra*, the Court held that although section 6 of the Clayton Act exempted labor[32] and agricultural organizations from the antitrust laws, and although section 2 of the Capper-Volstead Act exempts agricultural associations from the antitrust laws, the full effect of these actions is that although a group of farmers acting together cannot be restrained:

> "'. . . from lawfully carrying out the *legitimate objects* thereof' (emphasis added), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. [cases cited]" (pp. 465-466):

And further (pp. 466-467):

> ". . . It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly *by preying on independent producers, processors or dealers intent on carrying on their own business in their own legitimate way . . .*" (Emphasis added.)

So it is clear that Congress does not liberally grant antitrust exemptions and that even when immunity is

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[32]That section 6 does not manifest "a congressional purpose wholly to exempt" labor unions from the antitrust laws, see *Allen Bradley Co. v. Local Union No. 3* (1945), 325 U.S. 797, 805; *Duplex Printing Press Co. v. Deering* (1921), 254 U.S. 443, 468-469.

granted, the immunity will not extend to acts beyond the legitimate objects of the conduct immunized.

**B. A private corporation is not immune from the antitrust laws because it has an agency agreement with a foreign governmental agency if it unlawfully uses its agency powers to violate the antitrust laws**

Private corporations such as Union Carbide and VCA are not immune from the antitrust laws if they conspire to violate the antitrust laws, and if, as part of that conspiracy, they unlawfully use an agency agreement which one of their wholly owned and controlled subsidiaries has with an agency of the Canadian government to eliminate competitors from the Canadian market. Private corporations which undertake, through subsidiaries or otherwise, to assume certain functions as agencies of the government are themselves responsible for their own tortious conduct when that conduct conflicts with the antitrust laws.

The Sherman Act is violated if parties to a conspiracy use foreign laws, regulations or corporations to further an illegal conspiracy to restrain United States trade. It is fundamental that the antitrust laws encompass acts of a private corporation even though it has been incorporated by direction of a foreign government, used as a governmental agent, and is partly owned by the government. *United States v. Deutsches Kalisyndikat Gesellschaft* (S.D. N.Y. 1929), 31 F.2d 199. In this case, the Court held that where private commercial activities are involved, a private corporation is subject to the antitrust laws even though it was formed by direction of a foreign government and proceeds from its operation go into the

public treasury. The Court further held that an antitrust suit against such a private corporation is not a suit against the sovereign and that a private corporation in which a government has an interest is not a department of the government. As to the claim by the private corporation of sovereign immunity because of its agency relationship, the Court held (p. 202):

> "Nor can immunity be claimed by the defendant corporation, or on its behalf, or by or on behalf of any of its officers, agents, or employees, on the ground that they are acting as agents of a foreign government. *An agent does not cease to be answerable personally for his illegal acts because he is an agent, even though he may be an instrumentality of government.* Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp., 258 U.S. 549, 567, 42 S. Ct. 386, 66 L. Ed. 762. Officers and agents of a corporation are not officers or agents of its stockholders (U.S. v. Strang, supra), and it therefore cannot be successfully urged that an action against an officer or agent of a corporation in which a sovereign state is a stockholder is in fact an action against the sovereign state." (Emphasis added.)

As was stated by this Court in *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927) (p. 276):

> "Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their

jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws."

In *United States v. R. P. Oldham Company* (N.D. Cal. 1957), 152 F.Supp. 818, which involved an alleged conspiracy in the importation of Japanese nails, the Court stated (p. 821):

> "At the outset, it should be made clear that there is no attempt here to regulate Japanese commerce as such . . . Japanese firms and activities in Japan are considered only in so far as they relate to the precise charge, against American defendants, of a conspiracy in restraint of trade in the importation and sale of wire nails on the West Coast of the United States. Under the circumstances, it is absurd to say that principles of international law and comity of nations put the charges of this indictment within the exclusive jurisdiction of the Japanese Courts, or require that Japanese law be applied."

See also: *United States v. Aluminum Co. of America* (2 Cir. 1945), 148 F.2d 416; *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *In Re Grand Jury Investigation of the Shipping Industry* (D.C., 1960), 186 F.Supp. 298, 319; *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 (1943); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939).

**C. Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc., 365 U.S. 127 (1961) does not apply to the exclusion of competition accomplished under and pursuant to the terms of a conspiracy to monopolize an industry by predatory business tactics, even though part of the conspiracy included the use of one of the co-conspirator's subsidiaries which had been given the power to allocate vanadium by an agency of the Canadian Government**

The citation by the Court below to *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127 (1961) to support the proposition that the Canadian situation involved in this case and described above does not violate the Sherman Act is erroneous.

The *Noerr* decision, it is respectfully submitted, is a narrow and specific holding that the Sherman Act does not control joint action to lobby or to influence the passage of legislation, although, even in this field, this Court concedes "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of competitor and the application of the Sherman Act would be justified." (365 U.S. 144.) It is clear that the purpose and objective in the *Noerr* conspiracy was to associate and bring about forceful lobbying campaigns for the advantage of the lobbying group. The Canadian market arrangement in the instant case was a strict and classic market division agreement under which Union Carbide instructed its Canadian subsidiary to allocate vanadium imports only to Union Carbide and VCA, to eliminate petitioners from the Canadian field, to take away petitioners' Canadian customers, and to allo-

cate those customers between VCA and Union Carbide. (R. 828.) This traditional, predatory conduct has always been held to violate the Sherman Act in spite of claims of government approval.

In *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n, supra,* the complainant alleged defendants negotiated special rates with the military agencies of the government for the transportation of personnel by overall contracts in violation of the antitrust laws. Defendants claimed the rates fixed were fixed pursuant to the Interstate Commerce Act, that said Act specifically provided that such agreements were immune from the antitrust laws if approved by the I.C.C., and that such agreements were so approved and hence immune. The Court held that even though it should be found that the agreements were within the immunity section and an antitrust immunity certificate obtained, they nevertheless would be held as violations of the antitrust laws *if the agreements were part of a plan of the defendants in combining or conspiring to eliminate the competition of plaintiffs.* The Court held (p. 887):

> "*Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach,* rather than used merely to meet that competition, *the practices would be removed from the protection of section 5a(9).* We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices

for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved. [Cases cited.]" (Emphasis added.)

In *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), defendants contended, in answer to a charge that they had fixed rates in violation of the antitrust laws, that the ICC had actually approved the rates under the ICC Act standards. This Court held that even though rates were cleared by the ICC, the antitrust laws were violated if the rates fixed, although reasonable and nondiscriminatory, were restrictive rather than competitive.

This same problem was presented in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Among the numerous defendants indicted and found guilty of conspiring to fix the price of gasoline in violation of the antitrust laws was one C. E. Arnott, Vice-President of the defendant Socony-Vacuum. By Congressional authority and administrative appointment, Arnott was appointed chairman of the Planning and Coordination Committee's Marketing Committee, and requested to take action to restore markets to their normal condition. (p. 175.) Sections 3(a) and 5 of the NIRA Act permitted issuance of antitrust immunity certificates. It was admitted by defendants, including Arnott, that they did not obtain such certificates and hence were not immune from the antitrust laws. Defendants offered to prove governmental approval of Arnott's activities to show the purpose, effect, and reasonableness of the activities under the program. The Court rejected this and held that since immunity was *not* given, the defendants were responsible

even though acting as agents. The Court stated (pp. 225-227):

> "As to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (sec. 2(c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice."

The Court went on to say (pp. 227-228) that the fact that the buying programs may have been consistent with the general objectives and ends of the NIRA is likewise irrelevant to the legality under the Sherman Act of defendants' activities while the act was in effect, since price fixing combinations which lack Congressional sanction are illegal per se.

That a person cannot use lawful activity in an unlawful manner for an unlawful purpose and for an unlawful end and still have antitrust immunity was again reiterated in *Maryland & Virginia Milk Pro. Ass'n v. United States*, *supra*. The Court stated (pp. 466-467):

> ". . . [the Capper-Volstead Act] does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way."

The Court held the conduct complained of constituted anti-competitive activities so far outside the "legitimate objects" of a cooperative that, if proved, it would constitute a clear violation of Section 2 of the Sherman Act.

In the same way, the fact that Electromet of Canada had an agency agreement with an agency of the Canadian government is basically immaterial when it is proved that the corporation was under the complete domination and control of Union Carbide and that the agency relationship was used by Union Carbide and VCA to further their monopoly and conspiracy to control the American vanadium industry and, in furtherance of said conspiracy, to eliminate petitioners' Canadian business and thereby destroy them as a competitor to respondents in the American market.

To the same effect are: *Kobe, Inc. v. Dempsey Pump Co.* (10 Cir. 1952), 198 F.2d 416, *cert. denied* 344 U.S. 837 (1952); *Bankers Life and Casualty Company v. Larson* (5 Cir. 1958), 257 F.2d 377; *Floyd v. Gage* (4 Cir. 1951), 192 F.2d 137; *Crummer Co. v. Du Pont* (5 Cir. 1955), 223 F.2d 238, *cert. denied* 350 U.S. 848.

Legal means may not be used to accomplish an illegal objective. (*American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Kobe, Inc. v. Dempsey Pump Co.*, supra;

*United States v. Socony-Vacuum Oil Co.*, supra.) And if a combination or conspiracy taken as a whole violates the antitrust laws, it is not purged of its unlawfulness just because part of it may be valid. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *American Tobacco Co. v. United States* (6 Cir. 1944), 147 F.2d 93; *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

The recent decisions of the Circuit Court of Appeals for the Tenth Circuit in *Union Carbide and Carbon Corporation, et al. v. Howard Balsley, et al.* (Civil Action No. 6321) and *Union Carbide and Carbon Corporation v. Frank Nisley* (Civil Action No. 6319), (10 Cir. 1961) 1962 Trade Cases, Par. 70,222, page 75,805, involved these same defendants, this same industry, and the same overall conspiracy alleged in the case at bar. The Court of Appeals affirmed the implicit findings in the jury verdict that an overall conspiracy to take over every phase of the vanadium industry existed and caused injury to the plaintiffs. In the *Nisley* case, the plaintiff, as the respondents in the case at bar, was an independent miller who was put out of business by the acts of these defendants. In both cases, the defendants raised as a partial defense the fact that defendant Union Carbide had certain agency relationships with the government and hence those activities were immune. The court on appeal rejected this contention and held that there was nothing in the agency agreements which justified the interference that the government intended to transgress the antitrust laws and that there was no authority in the agreements to fix prices, restrain trade or achieve a monopoly in the vanadium industry by combining with its competitor, VCA. (1962 Trade Cases, Par.

70,222, page 75,816.) In the *Nisley* case, the court stated further, at page 75,830:

> "What we said in that respect Balsley is apposite here, and we may add that it is one thing to incite or influence government action which results in monopolistic practices as in Eastern R. Conf. v. Noerr Motors, 365 U.S. 127. It is quite another thing to utilize, or attempt to utilize, governmental powers conferred upon a private agency such as USV (Union Carbide) for unintended and illegal ends."

One last observation: granted the all-embracing conspiracy to restrain and to monopolize and the actual monopolization of the vanadium industry in all its phases —how better maintain that monopolization during times of stress which promise alleviation to its victims in the form of new competitive factors, than by the use of governmental relationships (acquired by the monopolist for legitimate ends) to destroy or to neutralize those new competitive forces? The Canadian subsidiary was just the weapon required to maintain the monopoly in Canada and to deprive petitioners of an important market during the war. The temptation to use the governmental agency acquired by that Canadian subsidiary to further the monopoly proved too great for these respondents.

## CONCLUSION

For the foregoing reasons petitioners respectfully urge that the Court reverse the judgment entered herein and remand the action to the District Court for retrial.

Dated, March 1, 1962.

Respectfully submitted,

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**(Appendix A Follows.)**